

Transcript of Proceedings and Testimony
(8041-8076-8256)—(Continued):

Witnesses for Plaintiff James L. Winton:

Larson, Robert C.

—direct	113
—cross	123

Sicke, Kurt H.

—direct	105
—cross	112

Witness for United States of America:

Capps, Albert M.

—direct	126
—cross	137
—redirect	143

	Original	Print
Proceedings in the U.S.C.A. for the Ninth Circuit		
Minute entry of argument and submission (omitted in printing)	241	241
← Order directing filing of opinion and filing and recording of judgment	242	241
Opinion, Hamley, J.	243	242
Judgment	257	255
Clerk's certificate (omitted in printing)	258	255
Order allowing certiorari	259	256

—In the District Court of the United States
for the District of Oregon

Civil No. 8041

HENRY L. HESS, JR., Administrator of the
Estate of George William Graham, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT

Plaintiff for cause of action against the defendant alleges as follows:

I.

This action is brought under and the court has jurisdiction of the cause by virtue of Title 28, § 1346 (b) F.C.A.

II.

That plaintiff was on or about the 4th day of April, 1955 appointed administrator of the Estate of George William Graham, Deceased by order of the Circuit Court of the State of Oregon for Multnomah County; thereafter qualified, is now and ever since said date has been the duly appointed, qualified and acting administrator of said estate.

III.

That plaintiff's decedent was to the time of his death a resident of Cowlitz County, Washington, and no person entitled to bring this action as a named beneficiary under O. R. S. 654.325 is a resident of the State of Oregon.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958 9

No. 5

**HENRY L. HESS, JR., ADMINISTRATOR OF THE
ESTATE OF GEORGE WILLIAM GRAHAM, DE-
CEASED, PETITIONER,**

vs.

UNITED STATES OF AMERICA.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**PETITION FOR CERTIORARI FILED OCTOBER 13, 1958
CERTIORARI GRANTED MARCH 2, 1959**

No. 15685

United States
Court of Appeals
for the Ninth Circuit

HENRY L. HESS, Jr., Administrator of the
Estate of George William Graham, deceased,
Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint (8041).....	11
Appeal:	
Bond for Costs on (8041).....	70
Certificate of Clerk to Transcript of Record on	76
Designation of Record on (8041).....	74
Notice of (8041).....	69
Statement of Points on (8041).....	71
Bond for Costs on Appeal (8041).....	70
Certificate of Clerk to Transcript of Record...	76
Complaint (8041)	3
Designation of Record (8041).....	74
Findings of Fact and Conclusions of Law (8041-8076-8256)	48
Judgment (8041-8076-8256)	62
Motion to Amend Findings of Fact and Objections to Conclusions of Law (8041-8076-8256) ..	63

Namés and Addresses of Attorneys.....	1
Notice of Appeal (8041).....	69
Opinion of Judge Solomon (8041-8076-8256)...	47
Order Denying Motion to Amend Findings of Fact and Objections to Conclusions of Law (8041-8076-8256)	68
Pre-Trial Order on Segregated Issues of Law (8041-8076-8256)	19
Statement of Points to Be Relied Upon (8041)	71
Stipulation for Consolidation (8041-8076-8256)	18
Stipulation of Facts (8041-8076-8256).....	34
Transcript of Proceedings and Testimony (8041-8076-8256)	78
Exhibit for Defendant:	
8—Deposition of Patrick J. Leonti.....	147
Deposition of Grover Goebel.....	221
Admitted in Evidence.....	101
Witness for Plaintiff Henry L. Hess:	
Coles, Henry A.	
—direct	81
—cross	93, 100
—redirect	103

NAMES AND ADDRESSES OF ATTORNEYS

HESS AND HESS,

CLAYTON HESS,

825 Yeon Building,

Portland 4, Oregon,

For Appellant.

GEORGE COCHRAN DOUB,

Assistant United States Attorney General,

PAUL A. SWEENEY,

LEAVENWORTH COLBY,

ALAN S. ROSENTHAL,

Attorneys, Department of Justice,

Washington 25, D. C.,

C. E. LUCKEY,

United States Attorney,

ROBERT R. CARNEY,

Assistant United States Attorney,

United States Courthouse,

Portland, Oregon,

KEITH R. FERGUSON,

Special Assistant to Attorney General,

447-A Post Office Building,

San Francisco, Calif.,

For Appellee.

IV.

That at all times mentioned herein the defendant was an employer and the owner of a dam across the Columbia River, near Bonneville, Oregon together with appurtenant electric power generating and transmitting facilities, locks, fishways and other equipment convenient and necessary to the operation thereof, and in connection therewith is and at all times material hereto was in charge of and responsible for work involving risk and danger to employees and the public.

V.

That at all times material hereto the maintenance and operation of said dam was and now is by law committed to and under the direction of the Secretary of the Army and the supervision of the Chief of United States Army Engineers Corps of the United States, an agency of the defendant.

VI.

That the dam is so constructed that the defendant may send water through or restrain water from going through any one or more of numerous gates across the face thereof and when water is being let through a gate or gates it rushes through with great force, violence and turbulence and creates a strong undertow in the vicinity of the gate or gates which are open, all of which makes it extremely hazardous and dangerous to be near an open gate in any type of vessel.

VII.

On or about the 23rd day of June, 1954, the United States Army Corps of Engineers let to Robert C. Larson, doing business as Larson Construction Company, a contract for repair of the apron and baffles on a portion of said dam which work was to be done during the 1954-1955 low-water period of the Columbia River; the work so contemplated made necessary the construction of a coffer dam across a portion of the down-river face of the dam in order to expose the apron and baffles to be repaired, and in turn made necessary certain initial survey work.

VIII.

That at all times material hereto plaintiff's decedent George William Graham was an employee of Robert C. Larson, doing business as Larson Construction Company, and was, among other things, employed to assist in a portion of the survey work, aforesaid, and thereafter to assist in the building of said coffer dam and said work involved risk and danger to the said George William Graham from the operations of both his employer and the defendant.

IX.

That on or about August 20, 1954, plaintiff's decedent, George William Graham, acting within the scope and course of his employment, as aforesaid, was aboard the tug "Mule Duzer" proceeding from south to north upon the waters of said river and along the face of said dam for survey purposes

when the said tug was swamped, overturned and sunk.

X.

That the swamping, overturning and sinking of said tug was proximately caused by the negligence of the defendant acting by and through its servants and agents, in that the defendant failed to use every device, care, and precaution practicable to be used for the protection and safety of life and limb, in that it would have been practicable without impairing the efficiency of the operation to use the care hereinafter set forth and take the following precautions, to-wit:

(1) To have set up a liaison system between the defendant's servants, agents and employees and the plaintiff's employer advising the plaintiff's employer upon which of the defendant's servants, agents and employees he could call to have gates closed in order to furnish a quiet pool within which to work.

(2) To have delegated authority to some one or more of its servants and agents to close any one or more gates in the vicinity of the work upon the request of plaintiff's employer in order to furnish a quiet pool within which to work.

(3) To have closed the gates in the vicinity of the work at the request of the plaintiff's employer in order to furnish a quiet pool in which to work.

(4) To have closed a sufficient number of gates in and near the vicinity of the work to furnish a quiet pool in which to work.

(5) It was necessary for the safety of persons

employed about said dam, including the plaintiff's decedent, that a system of communication be provided by means of signals between the operators of the dam and those whose work required them to be on the down-river side thereof in order that there might be prompt and efficient communication between the same, but the defendant failed and neglected to provide a prompt, efficient or any means of communication, as aforesaid.

(6) The defendant knew or by the exercise of reasonable care should have known of the dangerous undertow in the vicinity of open gates, but carelessly and negligently failed to warn the plaintiff's decedent or his employer thereof.

(7) The defendant was at all times in complete control of the operation of said dam, the force and volume of water to be let through the same and the place at which such water would be released and knew, or by the exercise of reasonable care should have known, that the tug "Mule Duzer", with the plaintiff's decedent and others aboard, would be and was operating along the face of the dam but the defendant carelessly and negligently failed to furnish plaintiff's decedent a reasonably safe place to work, in that it failed and neglected to close the gates and restrain the flow of water in the vicinity of the work being done.

(8) The defendant was at all times in complete control of the operation of said dam, the force and volume of water to be let through the same, and the place at which such water would be released and knew, or by the exercise of reasonable care should

have known, that the tug "Mule Duzer", with the plaintiff's decedent and others aboard, would be and was operating along the face of the dam but the defendant carelessly and negligently left the gates immediately adjacent to the work site open, thereby sending great volumes of water through the gates immediately adjacent to the work and thereby created highly dangerous turbulence and undertow at and near the work site. But the defendant failed and neglected to use the care or take the precautions hereinabove by sub-paragraphs (1) to (8) inclusive set forth.

XI.

That proximately as a result of the swamping and sinking of the tug "Mule Duzer" caused by the negligence and failure of the defendant to take practicable precautions, as hereinabove set forth, the plaintiff's decedent, George William Graham, was cast into the waters of the Columbia River and lost his life by drowning on August 20, 1954.

XII.

That the said George William Graham was a carpenter by trade, an industrious, frugal, healthy, able-bodied man and at the time of his death was 53 years of age, earning and capable of continuing to earn in the future sums in excess of \$560.00 per month and had a life expectancy of 19.19 years.

XIII.

That the said George William Graham left surviving him a minor daughter, Karen Lee Graham, born January 16, 1938, a son, George Gordon Gra-

ham, born December 17, 1934, and his wife, Betty Graham, on whose behalf and for whose use and benefit this action is brought for the purpose of recovering damages sustained by them through the wrongful death of said decedent.

XIV.

That as a result of the death of said George William Graham funeral and burial expenses were incurred as follows:

Moore-Ditlevson Funeral home, Kelso, Washington	\$682.07
Grave Marker	79.83
Burial Plot	100.00
Opening and closing grave.....	30.00
Minister, flowers, and miscellaneous..	49.75
	<hr/>
	\$941.65

That said sums were reasonable for the services rendered and material supplied in connection with the burial of the said George William Graham.

XV.

That by reason of the death of the said George William Graham, Betty Graham, as surviving wife, has been deprived of the love, affection, care, services, support, companionship, society and consortium of the said George William Graham and because of his death has been compelled to pay and will be compelled to pay substantial sums for the care of the said Karen Lee Graham and George Gordon Graham, children of the decedent and Betty Graham; that the surviving children, aforesaid,

have been deprived of the support, love, care, guidance, moral, religious and intellectual training and instruction and of the protection of their father, all to the general damage of the plaintiff as Administrator of the Estate of George William Graham, Deceased, and for the benefit of the three survivors above named in the aggregate sum of \$100,000.00.

XVI.

That the plaintiff has employed Leland F. Hess and Clayton Hess as his attorneys to bring this action and has agreed with said attorneys that they shall be compensated in the sum of twenty per cent of all such amounts as may be recovered herein and that twenty per cent of such sums as may be recovered herein would be a reasonable fee to be allowed said attorneys.

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Thousand Dollars (\$100,000.00) general damages, Nine Hundred Forty-One and 65/100 (\$941.65) Dollars special damages, for his costs and disbursements incurred herein, and that out of such sum as may be recovered herein plaintiff's attorneys be allowed a reasonable fee to the extent of twenty per cent (20%) of such sums.

HESS & HESS,

/s/ By CLAYTON HESS,

Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Robert R. Carney, Assistant United States Attorney, acting under direction of The Attorney General of the United States, and for answer to the complaint on file herein alleges:

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The venue of this action does not lie in the United States District Court for the District of Oregon, but, on the contrary, venue lies, if the suit is maintainable at all, in the United States District Court for the Western District of Washington, Southern Division, for the following reasons, to wit:

1. This is a civil action on a tort claim against the United States under sub-section (b) of Section 1346 of Title 28, USCA.

2. That plaintiff brings this action as the personal representative of the decedent, George William Graham, who at the time of his death was a resident of Cowlitz County, Washington.

3. That the act or omission complained of in plaintiff's complaint occurred in Skamania County, Washington.

Third Defense

The court lacks jurisdiction of the subject matter of the cause, in that the facts alleged in the complaint constitute a discretionary function within the meaning of the exceptions set forth in 28 USCA, Section 2680(a) to the jurisdiction conferred upon the court by the Federal Tort Claims Act.

Fourth Defense

1. Defendant denies the allegations contained in Paragraph I of the complaint.

2. Defendant admits the allegations contained in Paragraphs II and III of the complaint.

3. Defendant admits that part of Paragraph IV of the complaint which alleges that at all times mentioned herein, the defendant was the owner of a dam across the Columbia River, near Bonneville, Oregon, together with appurtenant electric power generating and transmitting facilities, locks, fishways and other equipment convenient and necessary to the operation thereof, but denies all other allegations of Paragraph IV.

4. Defendant admits the allegations contained in Paragraph V of the complaint.

5. Defendant denies the allegations contained in Paragraph VI of the complaint.

6. Defendant admits the allegations contained in Paragraph VII of the complaint.

7. Defendant admits that part of Paragraph VIII of the complaint which alleges that at all

times material hereto, plaintiff's decedent, George William Graham, was an employee of Robert C. Larson, doing business as Larson Construction Company, and was, among other things, employed to assist in a portion of a survey work aforesaid, and thereafter to assist in the building of said cofferdam, but denies all other allegations of Paragraph VIII.

8. Defendant admits the allegations contained in Paragraph IX of the complaint.

9. Defendant denies the allegations contained in Paragraphs X, XI, XII, XIII, XIV, XV and XVI of the complaint and particularly denies that the plaintiff was damaged in any sum whatever.

Fifth Defense

1. On June 23, 1954 defendant entered into a certain contract numbered DA-35-026-eng-20855 with R. C. Larson, doing business as Larson Construction Company, hereinafter called the Contractor, for the construction of a cofferdam and restoration of baffles on south half of spillway baffle deck of the Bonneville Dam.

2. On August 20, 1954 plaintiff's decedent, George William Graham, was an employee of said Contractor and was aboard a certain tug "Mule Duzer", which at all times herein material was under the ownership and control of said Contractor; that on said date, said Contractor sent out said tug, pushing a barge designated "Osborne No. 12", on the waters of the Columbia River immediately

downstream of the Bonneville Dam, in order to perform certain survey work preliminary to the construction of the cofferdam.

3. That said Contractor, through its agents and employees, so carelessly and negligently operated its said tug and barge at said time and place, that the bow of said barge struck a pier of the dam with great force and violence, opening a large hole on the port side of the bow of said barge, which hole allowed large quantities of water to enter said barge and causing said tugboat and said barge to then and there become out of control and to drift northward over and in front of the gates of the dam, which were then open, causing said tug and barge to be swamped, overturned and sunk and causing the plaintiff's deceased to then and there lose his life.

4. That said Contractor, its agents and employees, were at all times herein mentioned careless, reckless and negligent in each of the following particulars, to wit:

a. In operating and maneuvering said tug and barge over and against the pier of said dam when the Contractor, its agents and employees knew, or in the exercise of ordinary care should have known, that operating said tug and barge against said pier in such manner created a grave and imminent hazard to persons in said tug and particularly the plaintiff's decedent herein.

b. In failing to keep a proper or any lookout

from said tug for objects in the path of said tug and barge.

e. In failing to keep said tugboat and barge under proper or any control at said time and place and in particular in failing to keep said barge from striking a pier of the dam.

d. In failing to have a standby boat and other standby equipment ready for use in the event of an emergency.

e. In failing to utilize lines suitably established between said tug, barge and dam so that the barge and tug could be hauled back in the event of danger.

f. In employing a tugboat of insufficient size and power to carry out the work then and there contemplated.

5. That said tugboat was unseaworthy and that it was of insufficient size and power to carry out the work then and there contemplated.

6. The sole and proximate cause of said collision and sinking of said tugboat and barge and all of the damages resulting therefrom and therein, including the death of plaintiff's decedent, George William Graham, was the negligence of said Contractor in the operation of said tugboat and barge in which plaintiff was a passenger and the unseaworthiness of said tugboat.

Sixth Defense

Defendant readopts and reasserts the allegations of defense hereinabove set forth in Paragraphs 1

and 2 of the Fifth Defense, and for further answer shows:

1. That the construction and work called for by the said contract were in charge of and under the control of R. C. Larson, doing business as Larson Construction Company, hereinafter called the Contractor.

2. That the defendant had no control of the details, manner, means or method by which the construction and work provided for by said contract were to be accomplished and was concerned only with the general result of the construction and work called for by the said contract.

3. That defendant retained only the right to inspect the construction and work of the Contractor as it progressed, in order to determine whether it was being completed in accordance with the specifications set forth in said contract.

4. Defendant had no duty under said contract to assist in the construction and work being accomplished by said Contractor, and no employees of defendant engaged or participated with said Contractor in the accomplishment of the construction and work required by said contract.

5. That plaintiff is an employee of said Contractor and was at the time of his death engaged in the prosecution of the work of said Contractor and was not engaged in any work of defendant; that defendant owed plaintiff no duty under the Oregon Employers' Liability Act.

Seventh Defense

Plaintiff's employment had certain risks incident thereto, which were obvious and well-known to plaintiff at all the times of his employment, and also when he first entered thereon, and those risks were assumed by him, and whatever injuries plaintiff received in his employment and which are complained of by him herein, arose from and were caused by those risks thus assumed by him.

Wherefore, defendant having fully answered plaintiff's complaint herein, prays that plaintiff take nothing by his action and that the complaint be dismissed and held for naught, and that defendant be given judgment for its costs and disbursements incurred herein.

C. E. LUCKEY,
United States Attorney,
District of Oregon,

/s/ **ROBERT R. CARNEY,**
Assistant United States
Attorney.

Affidavit of Mailing Attached.

[Endorsed]: Filed Sept. 7, 1955.

In the United States District Court
for the District of Oregon

Civil No. 8076

JAMES L. WINTON, as Administrator of the
Estate of Leonard L. Boylan, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil No. 8041

HENRY L. HESS, JR., as Administrator of the
Estate of George William Graham, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil No. 8256

JESSIE G. TOBIAS, as Administratrix of the
Estate of Merle L. Tobias, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

STIPULATION

It Is Stipulated by the parties hereto, by and
through their respective undersigned attorneys of
record; that the above-entitled actions may be con-

solidated for the purposes of motions, pretrial procedure and trial, and for all other purposes.

/s/ **GEOFFREY C. HAZARD, JR.,**
Of Attorneys for James L. Winton.

/s/ **CLAYTON HESS,**
Of Attorneys for Henry L. Hess, Jr.

/s/ **R. L. KRIESIER,**
Of Attorneys for Jessie G. Tobias.

/s/ **ROBERT R. CARNEY,**
Of Attorneys for Defendant.

[Endorsed]: Filed Feb. 28, 1956.

[Title of District Court and Causes.]

**PRETRIAL ORDER ON SEGREGATED.
ISSUES OF LAW**

The above-entitled causes came on for pretrial conference before the undersigned Judge of the above-entitled Court, plaintiff Henry L. Hess, Jr., appearing by Clayton Hess, of his attorneys; plaintiff James L. Winton, appearing by Geoffrey C. Hazard, Jr., of his attorneys; plaintiff Jessie G. Tobias appearing by Ray Mize, of her attorneys; and defendant United States of America appearing by Robert R. Carney, Assistant United States Attorney, of its attorneys.

Introductory Statement

These are actions against the United States of America for damages for the death of three persons resulting from the sinking of a tugboat and barge

on the Columbia River, in which jurisdiction is claimed by plaintiffs under the Federal Tort Claims Act.

This pretrial is upon the following segregated issues of law:

(a) Whether notice to the Deputy Commissioner of the Bureau of Employees' Compensation, Longshoremen's and Harbor Workers' Compensation Act, is a mandatory prerequisite to the bringing of this action against the defendant, who is one other than the employer of the plaintiffs' decedents.

(b) May plaintiffs' decedents maintain actions predicated on the Oregon Employers' Liability Act where the deaths of plaintiffs' decedents occurred on navigable waters, plaintiffs contending that said deaths were proximately caused by the negligent operation of a shore installation.

The issues of negligence, proximate cause and all other issues of fact and law are reserved for the pretrial and trial pending the determination of the above segregated issues of law.

Statement of Agreed Facts

I.

In Civil No. 8041, Henry L. Hess, Jr., is the duly appointed, qualified and acting administrator of the Estate of George William Graham, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 4, 1955. In Civil No. 8076, James L. Winton is the duly appointed, qualified and acting administrator of the

Estate of ~~Leonard~~ L. Boylan, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 26, 1955. George William Graham and Leonard L. Boylan were at the time of their death residents of the State of Washington and no persons entitled to bring this action as named beneficiaries under O.R.S. 654.325 as to such decedents are residents of the State of Oregon. Such personal representatives are the proper persons to bring these actions for the purposes of O.R.S. 654.325 and O.R.S. 30.020.

In Civil No. 8256, Jessie G. Tobias is the duly appointed, qualified and acting administratrix of the estate of Merle L. Tobias, having been duly appointed such administratrix by order of the Circuit Court of the State of Oregon for the County of Multnomah, and is the proper person to bring this action for the purpose of O.R.S. 30.020.

II.

These actions have been consolidated for the purposes of motions, pretrial procedure, trial and all other purposes.

III.

At all times herein material, George William Graham, Leonard L. Boylan and Merle L. Tobias were employees of Robert C. Larson, doing business as Larson Construction Company, hereinafter referred to as the Contractor, and all acts done by them therein related were done in the course of their employment by said contractor. Graham was

employed as a carpenter foreman, Boylan as a carpenter and Tobias as a civil engineer.

IV.

At all times herein material, Bonneville Dam was under the ownership and control of defendant, United States of America. Bonneville Dam consists of various facilities, principal among which are a powerhouse, which lies between the Oregon shore of the Columbia River and Bradford Island, and a spillway dam, which lies between Bradford Island and the Washington shore of the Columbia River. The spillway dam contains 18 bays and in each bay there is a movable gate. These bays are for convenience herein numbered 1 through 18, starting with the fishway bay on the Washington shore as Bay 1 and ending with the fishway bay on Bradford Island as Bay 18. The gates on the spillway dam are opened and closed by being lifted or dropped in a vertical direction. When shut, the gates rest on the top of the ogee section, which is the upper line of the submerged stationary portion of the dam.

On the bed of the river, extending downstream across the width of the dam, is a concrete structure called the baffle deck. The baffle deck is dotted with concrete blocks called baffles which are built into the deck. The baffles serve to dissipate the energy of the water discharged through the dam and to reduce the downstream velocity thereof. In the interval between the completion of the dam in 1938 and the summer of 1954, the baffle deck and

baffles had been eroded by the flow of water. The physical features of the dam are more clearly depicted in Exhibits 1 and 2 of this pretrial order.

V.

On June 23, 1954, the Contractor and defendant entered into a certain contract numbered DA-35-026-eng-20855 (Exhibit 3), for construction of a cofferdam and restoration of baffles on south half of the spillway baffle deck. The contract contemplated that the construction of the cofferdam and restoration of the baffles would be carried on by the Contractor without interruption of the normal power generation of the powerhouse. It further contemplated that the construction of the cofferdam would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse. The Contractor's employees, including Graham, Boylan and Tobias, entered upon defendant's premises at and about project site while the spillway dam was in operation. The contract further contemplated that Contractor would inform defendant of all steps which he proposed to take which would affect the operation of the spillway dam. By the terms of the contract, Contractor was to supply all equipment, including the tug and barge involved in these actions, and all labor used in the performance of the contract. The contract further contemplated that operation of the dam, including operation of spillway dam

gates, would be conducted by personnel of defendant.

VI.

On July 14, 1954, defendant gave the Contractor notice to proceed with the performance of the contract. Thereafter the Contractor commenced preliminary marshalling of equipment and construction materials on and in the vicinity of the project site. On August 13, 1954, defendant notified the Contractor that the water level of the river was such that, in accordance with Paragraph SC-1 of the contract, the contractor was to commence construction work on the water no later than August 23, 1954. Prior to August 16, 1954, the Contractor had erected his field office and certain other work facilities on the defendant's premises.

VII.

On August 13, 1954, Robert C. Larson conferred with Albert M. Capps, an employee of defendant and Project Superintendent in charge of the operation of Bonneville Dam, regarding the possibility of closing a number of gates of the spillway dam during preliminary construction work on the cofferdam. At that time, it was found possible to close Gates 11 through 17, that is, all the gates on the south half of the spillway dam from Gate 11 southward toward the Bradford Island side, except for the fishway gate, not material herein. As shown by Exhibit 4, Gates 11 through 17 were closed on August 13, 1954 and remained closed thereafter and during all times material herein.

VIII.

On August 16, 1954, Patrick S. Leonti, an employee of the defendant and Construction Project Engineer under said contract, arrived at Bonneville. Leonti's duties, among others, were to inspect the project during the construction by the Contractor, in order to ascertain that the Contractor was performing the contract in accordance with its terms. He also acted as liaison between the Contractor and those employees of the defendant concerned with operation of the dam. Leonti, between August 16, 1954 and August 20, 1954, familiarized himself with the project and conferred with Robert Larson and Harry Claterbos, Jr., Acting Superintendent for the Contractor, as to the Contractor's plans for carrying out the project. Leonti informed the Contractor that any requests by the Contractor for closing the gates in the spillway dam should be made through him and that he would relay such requests to the employees of defendant charged with operating the dam and its gates.

IX.

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib. The timber crib was to rest in Bay 9, starting at the top of the ogee curve and running at right angles to the face of the dam. The crib was to rest on the curved slope, the ogee, and was to be built to fit that curve as nearly as reasonably possible. The position and shape in which the crib was to be placed are indicated on Exhibits 5 and 6.

X.

The contract drawings showed the cross-section of the ogee as it had been originally constructed. See Exhibit 7. The Contractor concluded that the ogee might have been eroded to some degree and that the cross-section of the ogee accordingly might not still be the same as when originally constructed. The Contractor determined that it was necessary to take soundings of the ogee in Bay 9 for the purpose of establishing its true cross-section at that time. The contract did not require nor did it refer to the taking of soundings in the project area.

XI.

On August 18, 1954, the Contractor informed Leonti that it proposed to take soundings in Bay 9 on August 20, 1954. Leonti was informed that the Contractor intended to take a tug and barge out on the water below the dam to push the barge into Bay 9, and to take the soundings off the side of the barge. The Contractor requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 P.M. of August 20, 1954, to facilitate the sounding operation. The Contractor did not request any other gates to be closed than 9 and 10. Leonti forwarded this request to the operations division of the dam and by 12:30 P.M. of August 20th, the gates in these bays had been closed. With the closure of Gates 9 and 10, gates 9 through 17 were closed. The Contractor sought no advice from the defendant and defendant gave the Contractor no advice as to the hazards of the Contractor's proposed sounding operation.

XII.

Shortly before 2:00 P.M. on August 20, 1954, Contractor's Tug Muleduzer, pushing the Contractor's Barge Forest No. 12, set out from the Bradford Island shore of the river. The equipment and personnel utilized in the proposed sounding operation were selected solely by the Contractor. The tug's crew consisted of Magnor Larsen, Captain, and Henry Coles, deckhand, both of whom were employees of the Contractor. Also aboard were the members of the sounding party consisting of Graham, Boylan and Tobias and a man named Lewis. Graham and Boylan were in non-supervisory capacities and had no control with respect to the manner in which the sounding operation was to be conducted.

The tug was pushing the barge, which was made fast to the tug by four lines. Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug and the other two lines ran from the stern mooring bits of the barge to the stern winches of the tug. So fastened together, the tug and barge were in effect a unit.

XIII.

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and headed upstream for Bay 9. As the barge came to Bay 9, it veered north and the port bow of the barge struck the pier between Bay 9 and Bay 8, stoving a hole in the bow of the barge. As water came in through the hole, the barge moved

over in front of Bay 8 and the other open bays north of Bay 8. The barge and tug were swamped and sunk with the barge being broken to pieces. All those aboard the tug and barge were thrown into the water and all except Coles, the deckhand, were killed.

XIV.

As shown by Exhibit 4, Gate 8 was open two "dogs" so that the height of the aperture between the top of the ogee and the bottom of the gate was 32 inches; gate 7 was open three "dogs" so that the height of the aperture was 55 inches; gate 6 was open two "dogs," so that aperture was 32 inches high. These gates were all fifty feet wide and fifty feet high. The quantity of water being discharged from these gates was approximately as follows: 5,700 cubic feet per second from gates 8 and 6, and 9,100 cubic feet per second from gate 7.

XV.

The Contractor at the time of the death of Graham, Boylan and Tobias was insured by a qualified carrier against liability for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Neither the insurer nor the Contractor had given notice to the Deputy Commissioner that such insurance was in force and the Contractor had not otherwise secured the payment of such compensation as provided in 33 U.S.C. Section 932. The statutory beneficiaries of plaintiffs' decedents, pursuant to their application, were awarded and are presently receiving compensation under the Oregon Workman's Compensation Act.

XVI.

The beneficiaries under the Longshoremen's and Harbor Workers' Compensation Act of plaintiffs' decedents did not file any application for compensation under that Act, nor have they been awarded nor have they received any compensation under that Act.

XVII.

The beneficiaries under the Longshoremen's and Harbor Workers' Compensation Act have not filed with or given notice to the Deputy Commissioner of the Bureau of Employees' Compensation of an election to bring an action for damages against some persons other than the employer of plaintiffs' decedents as provided in 33 U.S.C. Section 933(a).

XVIII.

The deaths of plaintiffs' decedents occurred upon the navigable waters of the United States.

Plaintiffs' Contentions of Law**I.**

The Oregon Workman's Compensation Act validly provides compensation for the beneficiaries of the plaintiffs' decedents, so that the Longshoremen's and Harbor Workers' Compensation Act is inapplicable.

II.

Even if the Longshoremen's and Harbor Workers' Compensation Act is exclusively applicable, the beneficiaries failure to give notice to the Deputy Commissioner, Bureau of Employees' Compensation, is not fatal to the bringing of this action.

III.

Plaintiffs are not precluded from relying on the Oregon Employers' Liability Act by reason of the fact that the deaths of plaintiffs' decedents occurred on navigable waters.

Defendant denies foregoing contentions of law.

Defendant's Contentions of Law

I.

The deaths of plaintiffs' decedents were deaths for which compensation is or was payable under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq.

II.

Plaintiffs are precluded from any recovery against defendant by the failure of beneficiaries of plaintiffs' decedents under Longshoremen's and Harbor Workers' Compensation Act to give notice of election to sue a party other than the decedents' employer to the Deputy Commissioner, Bureau of Employees' Compensation, pursuant to 33 U.S.C. Section 933.

III.

An action for damages for death of a workman on the navigable waters within the territorial limits of Oregon is governed by the general maritime law.

IV.

There being no right of action for death under the general maritime law, the death statute of the State of Oregon is applicable to action for damages

for death of a workman occurring on navigable waters within the territorial limits of Oregon.

V.

Under the general maritime law, the Oregon Employers' Liability Act cannot be applied to actions for damages for death of a workman occurring on navigable waters within the territorial limits of Oregon.

Plaintiffs deny foregoing contentions of law.

Issues of Law

I.

Whether compensation for the death of plaintiffs' decedents is payable under the Longshoremen's and Harbor Workers' Compensation Act to the exclusion of the Oregon Workman's Compensation Act within the meaning of 33 U.S.C. Section 903.

II.

Assuming compensation for the deaths of plaintiffs' decedents is payable under the Longshoremen's and Harbor Workers' Compensation Act, were the beneficiaries of plaintiffs' decedents under that Act, as a prerequisite to the bringing of these actions, required to give notice of election to sue a party other than decedents' employer to the Deputy Commissioner, Bureau of Employees' Compensation, pursuant to 33 U.S.C. Section 933.

III.

Whether plaintiffs' remedy is under the Oregon

Wrongful Death Act or the Oregon Employers' Liability Act, in the event the latter is otherwise applicable to defendant.

Exhibits

The following exhibits have been displayed by the parties respectively and are below enumerated. Production of the originals is waived and, unless objection is noted, no further identification will be required at trial, nor will authentication of signatures or proof of identity of parties signing documents be demanded. Objections as to competency, relevancy and materiality are also waived unless especially noted.

Plaintiffs' Exhibits:

1. Site Map of Bonneville Dam, No. M-2-61/1.
2. Drawing of timber crib and ogee, No. M-2-61/5.
3. Contract No. DA-35-026-eng-20855.
4. Spillway Dam Record, August 13 & 20, 1954.
5. Photograph of timber crib No. 18000-1173.
6. Photograph of baffle deck No. 18000-1227.
7. Drawing of apron and baffle deck, No. M-2-61/3.

The parties hereto agree to the foregoing Pre-trial Order with respect to the segregated issues of law set forth herein, and the Court being fully advised in the premises,

Now Orders that the foregoing Pretrial Order

shall not be amended, except by consent of the parties or to prevent manifest injustice, and it is further,

Ordered that this Pretrial Order supersedes all pleadings with respect to the issues here presented, and it is further,

Ordered that the rights of the parties to pretrial and trial on the remaining issues of fact and law are reserved.

Dated at Portland, Oregon, this 3rd day of December, 1956.

/s/ GUS J. SOLOMON,

Judge.

/s/ CLAYTON HESS,

Of attorneys for plaintiff,

Henry L. Hess, Jr.

/s/ GEOFFREY C. HAZARD, Jr.

Of attorneys for plaintiff,

James L. Winton.

/s/ RAY MIZE,

Of attorneys for plaintiff,

Jessie G. Tobias.

/s/ ROBERT R. CARNEY,

Assistant United States Attorney,

Of attorneys for defendant.

[Endorsed]: Filed Dec. 3, 1956.

[Title of District Court and Causes.]

STIPULATION

It Is Hereby Stipulated by and between the respective parties hereto:

I.

Henry L. Hess, Jr., James L. Winton and Jessie G. Tobias are all residents of Oregon.

In Civil 8041, Henry L. Hess, Jr., is the duly appointed, qualified and acting administrator of the Estate of George William Graham, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 4, 1955. In Civil 8076, James L. Winton is the duly appointed, qualified and acting administrator of the Estate of Leonard L. Boylan, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 26, 1955. George William Graham and Leonard L. Boylan were at the time of their deaths residents of the State of Washington and no persons entitled to bring this action as named beneficiaries under ORS 654.325 as to such decedents are residents of the State of Oregon. Such personal representatives are the proper persons to bring these actions for the purposes of ORS 654.325 and ORS 30.020.

In Civil 8256, Jessie G. Tobias is the duly appointed, qualified and acting administratrix of the estate of Merle L. Tobias, having been duly appointed such administratrix by order of the Cir-

cuit Court of the State of Oregon for the County of Multnomah, and is the proper person to bring this action for the purpose of ORS 30.020.

For the purposes of this action for the death of Merle L. Tobias, Jessie G. Tobias shall also be deemed to have brought this action individually as the widow and surviving spouse of Merle L. Tobias and as guardian of the persons and property of Mary Tobias and Robert Tobias, the surviving minor children of Merle L. Tobias.

II.

These actions have been consolidated for the purposes of motions, pretrial procedure, trial and all other purposes.

III.

At all times herein material, George William Graham, Leonard L. Boylan and Merle L. Tobias were employees of Robert C. Larson, doing business as Larson Contruction Company, hereinafter referred to as the Contractor, and all acts done by them herein related were done in the course of their employment by said Contractor. Graham was employed as a carpenter foreman, Boylan as a carpenter and Tobias as a civil engineer.

IV.

At all times herein material, Bonneville Dam was under the ownership and control of defendant, United States of America. Bonneville Dam consists of various facilities, principal among which are a powerhouse, which lies between the Oregon

shore of the Columbia River and Bradford Island, and a spillway dam, which lies between Bradford Island and the Washington shore of the Columbia River. The spillway dam contains 18 bays and in each bay there is a movable gate. These bays are for convenience herein numbered 1 through 18, starting with the fishway bay on the Washington shore as Bay 1 and ending with the fishway bay on Bradford Island as Bay 18. The gates on the spillway dam are opened and closed by being lifted or lowered in a vertical direction. When shut, the gates rest on the top of the ogee section, which is the upperline of the submerged stationary portion of the dam.

On the bed of the river, extending downstream across the width of the dam, is a concrete structure called the baffle deck. The baffle deck is dotted with concrete blocks called baffles which are built into the deck. The baffles serve to dissipate the energy of the water discharged through the dam and to reduce the downstream velocity thereof. In the interval between the completion of the dam in 1938 and the summer of 1954, the baffle deck and baffles had been eroded to some unascertained degree by the flow of water. The physical features of the dam are more clearly depicted in Exhibits 1 and 2.

V.

On June 23, 1954, the Contractor and defendant entered into a certain contract numbered DA-35-026-eng-20855 (Exhibit 3), for construction of a cofferdam and restoration of baffles on south half of the

spillway baffle deck. The contract contemplated that the construction of the cofferdam and restoration of the baffles would be carried on by the Contractor without interruption of the normal power generation of the powerhouse. It further contemplated that the construction of the cofferdam would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse. The Contractor's employees, including Graham, Boylan and Tobias, entered upon defendant's premises at and about project site while the spillway dam was in operation. The contract further contemplated that Contractor would inform defendant of all steps which he proposed to take which would affect the operation of the spillway dam. By the terms of the contract, Contractor was to supply all equipment, including the tug and barge involved in these actions, and all labor used in the performance of the contract. The contract further contemplated that operation of the dam, including operation of spillway dam gates, would be conducted by personnel of defendant.

VI.

On July 14, 1954, defendant gave the Contractor notice to proceed with the performance of the contract. Thereafter the Contractor commenced preliminary marshalling of equipment and construction materials on and in the vicinity of the project site. On August 13, 1954, defendant notified the

Contractor that the water level of the river was such that, in accordance with Paragraph SC-1 of the contract, the contractor was to commence construction work on the water no later than August 23, 1954. Prior to August 16, 1954, the Contractor had erected his field office and certain other work facilities on the defendant's premises.

VII.

On August 13, 1954, Robert C. Larson conferred with Albert M. Capps, an employee of defendant and Project Superintendent in charge of the operation of Bonneville Dam, regarding the possibility of closing a number of gates of the spillway dam during preliminary construction work on the cofferdam. At that time, it was found possible to close Gates 11 through 17, that is, all the gates on the south half of the spillway dam from Gate 11 southward toward the Bradford Island side, except for the fishway gate, not material herein. As shown by Exhibit 4, Gates 11 through 17 were closed on August 13, 1954, and remained closed thereafter and during all times material herein.

VIII.

On August 16, 1954, Patrick S. Leonti, an employee of the defendant and Construction Project Engineer under said contract, arrived at Bonneville. Leonti's duties, among others, were to inspect the project during the construction by the Contractor, in order to ascertain that the Contractor was performing the contract in accordance with its

terms. He also acted as liaison between the Contractor and those employees of the defendant concerned with operation of the dam. Leonti, between August 16, 1954 and August 20, 1954, familiarized himself with the project and conferred with Robert Larson and Harry Claterbos, Jr., Acting Superintendent for the Contractor, as to the Contractor's plans for carrying out the project. Leonti informed the Contractor that any requests by the Contractor for closing the gates in the spillway dam should be made through him and that he would relay such requests to the employees of defendant charged with operating the dam and its gates.

IX.

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib. The timber crib was to rest in Bay 9, starting at the top of the ogee curve and running at right angles to the face of the dam. The crib was to rest on the curved slope, the ogee, and was to be built to fit that curve as nearly as reasonably possible. The position and shape in which the crib was to be placed are indicated on Exhibits 5 and 6.

X.

The contract drawings showed the cross-section of the ogee as it had been originally constructed. See Exhibit 7. The Contractor concluded that the ogee might have been eroded to some degree and that the cross-section of the ogee accordingly might not still be the same as when originally constructed.

The Contractor determined that it was necessary to take soundings of the ogee in Bay 9 for the purpose of establishing its true cross-section at that time. The contract specifications did not require nor did it refer to the taking of soundings in the project area.

XI.

On August 18, 1954, the Contractor's representative informed Leonti that they proposed to take soundings in Bay 9 on August 20, 1954. Leonti was informed that the Contractor intended to take a tug and barge out on the water below the dam to push the barge into Bay 9, and to take soundings off the side of the barge. The Contractor requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 P.M. of August 20, 1954, to facilitate the sounding operation. The Contractor did not request any other gates to be closed than 9 and 10. Leonti forwarded this request to the operations division of the dam and by 12:30 P.M. of August 20, the gates in these bays had been closed. With the closure of Gates 9 and 10, Gates 9 through 17 were closed. The contractor sought no advice from the defendant and defendant gave the Contractor no advice as to the hazards of the Contractor's proposed sounding operation.

XII.

Shortly before 2:00 P.M. on August 20, 1954, Contractor's Tug Muleduzer, pushing the Contractor's Barge Forest No. 12, set out from the Bradford Island shore of the river. The equipment and

personnel utilized in the proposed sounding operation were selected solely by the Contractor. The tug's crew consisted of Magnor Larson, Captain, and Henry Coles, deckhand, both of whom were employees of the Contractor. Also aboard were the members of the sounding party, consisting of Graham, Boylan and Tobias and a man named Lewis. Graham, Boylan and Lewis were in non-supervisory capacities and had no control with respect to the manner in which the sounding operation was to be conducted. Tobias was Civil Engineer in charge of this sounding operation for his employer, the Contractor.

The tug was pushing the barge, which was made fast to the tug by four steel lines. Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug and the other two lines ran from the stern mooring bits of the barge to the stern winches of the tug. So fastened together, the tug and barge were in effect a unit.

XIII.

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and headed upstream for Bay 9. As the barge came to Bay 9, it veered north and the port bow of the barge struck the pier between Bay 9 and Bay 8, stoving a hole in the bow of the barge. As water came in through the hole, the barge moved over in front of Bay 8 and the other open bays north of Bay 8. The barge and tug were swamped and sunk with the barge being broken to pieces. All those aboard the tug and barge were

thrown into the water and all except Coles, the deckhand, were drowned.

XIV.

As shown by Exhibit 4, at the time of the accident, Gate 8 was open two "dogs" so that the height of the aperture between the top of the ogee and the bottom of the gate was 32 inches; Gate 7 was open three "dogs" so that the height of the aperture was 55 inches; Gate 6 was open two "dogs," so that the aperture was 32 inches high. These gates were all fifty feet wide and fifty feet high. The quantity of water being discharged from these gates at that time was approximately as follows: 5,700 cubic feet per second from Gates 8 and 6, and 9,100 cubic feet per second from Gate 7. At this time, the elevation of the forebay in the spillway dam was about 73.5 feet and the elevation of the tailrace below spillway dam was about 18.6 feet. The elevation of the crest of the ogee at the spillway dam was about 24 feet, as measured from a fixed reference point at the dam. All elevations are measured from a fixed reference point at the dam.

XV.

The deaths of plaintiffs' decedents occurred upon the navigable waters of the United States.

XVI.

The ages and life expectancies according to the 1941 Commissioners Standard Ordinary Mortality Table, of plaintiffs' decedents at the time of their deaths were as follows:

Name	Age	Life Expectancy
Graham	53	19.19
Boylan	54	18.48
Tobias	48	22.88

XVII.

The relatives of plaintiffs' decedents, their ages, and their degree of dependency on their decedents at the time of the death of the decedents were as follows:

GEORGE WILLIAM GRAHAM

Name	Relationship	Age	Degree of Dependency
Betty Graham	Wife	44	Subject to proof
Karen Lee Graham	Daughter	16	Subject to proof
George Gordon Graham	Son	19	Subject to proof

LEONARD L. BOYLAN

Name	Relationship	Age	Degree of Dependency
Lydia Lenora Boylan	Wife	49	Subject to proof
Naomi Lenora Simpson	Daughter	Legal	None
Betty Jane Stewart	Daughter	Legal	None
Vernon Leroy Boylan	Son	Legal	None
Jennita Massey	Daughter	19	None
William Albert Boylan	Son	15	Subject to proof
Florence Marie Boylan	Daughter	13	Subject to proof

MERLE L. TOBIAS

Name	Relationship	Age	Degree of Dependency
Jessie G. Tobias	Wife	45	Subject to proof
Mary Tobias	Daughter	14	Subject to proof
Robert Tobias	Son	18	Subject to proof

XVIII.

The reasonable funeral expenses incurred with respect to plaintiffs' decedents were as follows:

Name	Funeral Expenses
George William Graham	\$ 941.65
Leonard L. Boylan	742.17
Merle L. Tobias	1,049.50

XIX.

Immediately after the sinking of the tug and barge, a distress whistle was sounded at the spillway dam. Defendant immediately commenced closing the gates of the spillway dam, completing closure of all the gates at 3:45 P.M. on August 20, 1954. Immediately thereafter, defendant reopened some of the gates. The sequence and time in which these gates were closed and reopened are shown in Exhibit 4.

XX.

Defendant was not an employer subject to the provisions of the Oregon State Workmen's Compensation Act.

XXI.

Should plaintiffs prevail in this action, twenty per cent of the sums respectively awarded is a reasonable sum to be allowed their respective counsel, out of, but not in addition to, the amounts of the respective awards to plaintiffs.

XXII.

The tug Muleduzer is 50 feet long, has a 15-foot beam, draws 5½ feet aft and 2½ feet forward. It has two No. 671 GMC 165 horsepower diesel engines which drive two 4-bladed bronze propellers through 3 to 1 reduction gears.

XXIII.**Exhibits**

The following exhibits have been displayed by the parties respectively and are below enumerated. Production of the originals is waived and, unless objection is noted, no further identification will be required at trial, nor will authentication of signatures or proof of identity of parties signing documents be demanded. Objections as to competency, relevancy and materiality are reserved.

Exhibit Nos: Description.

1. Site Map of Bonneville Dam, No. M-2-61/1.
2. Drawing of timber crib and ogee, No. M-2-61/3.
3. Contract No. DA-35-026-eng-20855.
4. Spillway Dam Record, August 13th & 20, 1954.
5. Photograph of timber crib No. 18000-1173.
6. Photograph of baffle deck No. 18000-1227.
7. Drawing of apron and baffle deck, No. M-2-61/5.
8. Depositions of: Patrick J. Leonti, Grover G. Goebel, Albert M. Capps.
9. Deposition of Robert C. Larson.
10. Survey of Barge.
11. Photograph of Floating Plant with template, No. 18000-1153.
12. Photograph of Cofferdam No. 18000-1205.
13. Photograph of Cofferdam from Washington Shore, No. 18000-1207.
14. Photograph of Cofferdam and baffle deck, No. 18000-1228.

15. Photograph of face of spillway dam, No. B-305.

16. Photograph of Stilling basin looking North, No. B-308.

17. Hydrology Data, August 1954.

18. Letter from Larson to District Engineer dated July 2, 1954.

19. Letter from Larson to Corps of Engineers dated August 2, 1954.

20. Statement of Henry A. Coles.

21. Photograph of Warning sign on Bradford Island.

22. Photograph of Warning sign on Washington Shore.

23. Federal Income Tax Returns of Merle L. Tobias, 1951, 1952, 1953, and 1954.

24. Federal Income Tax Returns of George W. Graham.

25. Federal Income Tax Returns of Leonard L. Boylan.

Dated at Portland, Oregon, this 3rd day of December, 1956.

/s/ GEOFFREY C. HAZARD, JR.,

Of Attorneys for James L. Winton.

/s/ CLAYTON HESS,

Of Attorneys for Henry L. Hess, Jr.

/s/ HERMAN P. HENDERSHOTT,

Of Attorneys for Jessie G. Tobias.

/s/ ROBERT R. CARNEY,

Of Attorneys for Defendant.

[Endorsed]: Filed Dec. 3, 1956.

[Title of District Court and Causes.]

OPINION

March 29, 1957.

Solomon, Judge:

Each of the above actions against the United States was brought under the Federal Tort Claims Act for damages for wrongful death resulting from the sinking of a tugboat and barge on the Columbia River.

The United States contends that it cannot be sued by these plaintiffs because the deaths fell under the exclusive jurisdiction of the Federal Longshoreman's and Harbor Workers' Compensation Act and the plaintiffs did not comply with the provisions of that Act relating to notice to the Bureau of Employees' Compensation of their intention to sue a third party. Without reaching the question whether these notice provisions are a condition precedent to suit, I find this contention is without merit because the cases do not fall under the jurisdiction of the Federal Longshoreman's Act.

Plaintiffs contend that the standard of care and the measure of damages is to be determined by the Oregon Employers' Liability Act. In my view, this Act is not applicable for the reason that the Government was not responsible for the work there being performed, and for the further reason that the high standard of care required under the Act, if applied to these cases, would be unconstitutional. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1916);

Sanderson v. Sause Bros. Ocean Towing Co. D. C. Or. 1953, 114 F.Supp. 849.

I further find that plaintiffs have failed to prove that defendant was guilty of negligence in any respect, and they are therefore not entitled to recover under the Oregon Wrongful Death Statute, ORS 30.020, the only act under which they could recover.

Defendant shall submit findings of fact, conclusions of law and a judgment in accordance with this memorandum opinion.

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Causes.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiffs Henry L. Hess, Jr., James L. Winton and Jessie G. Tobias are all residents of Oregon.

In Civil 8041, Henry L. Hess, Jr., is the duly appointed, qualified and acting administrator of the Estate of George William Graham, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 4, 1955. In Civil 8076, James L. Winton is the duly appointed, qualified and acting administrator of the Estate of Leonard L. Boylan, Deceased, having been duly ap-

pointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 26, 1955. George William Graham and Leonard L. Boylan were at the time of their deaths residents of the State of Washington and no persons entitled to bring this action as named beneficiaries under ORS 654.325 as to such decedents are residents of the State of Oregon. Such personal representatives are the proper persons to bring these actions for the purposes of ORS 654.325 and ORS 30.020.

In Civil 8256, Jessie G. Tobias is the duly appointed, qualified and acting administratrix of the estate of Merle L. Tobias, having been duly appointed such administratrix by order of the Circuit Court of the State of Oregon for the County of Multnomah, and is the proper person to bring this action for the purpose of ORS 30.020.

For the purposes of this action for the death of Merle L. Tobias, Jessie G. Tobias is deemed to have brought this action individually as the widow and surviving spouse of Merle L. Tobias and as guardian of the persons and property of Mary Tobias and Robert Tobias, the surviving minor children of Merle L. Tobias.

2. These actions were consolidated for trial.

3. At all times herein material, George William Graham, Leonard L. Boylan and Merle L. Tobias were employees of Robert C. Larson, doing business as Larson Construction Company, hereinafter re-

ferred to as the Contractor, and all acts done by them herein related were done in the course of their employment by said Contractor. Graham was employed as a carpenter foreman, Boylan as a carpenter and Tobias as a civil engineer.

4. At all times herein material, Bonneville Dam was under the ownership and control of defendant, United States of America. Bonneville Dam consists of various facilities, principal among which are a powerhouse, which lies between the Oregon shore of the Columbia River and Bradford Island, and a spillway dam, which lies between Bradford Island and the Washington shore of the Columbia River. The spillway dam contains 18 bays and in each bay there is a moveable gate. These bays are for convenience herein numbered 1 through 18, starting with the fishway bay on the Washington shore as Bay 1 and ending with the fishway bay on Bradford Island as Bay 18. The gates on the spillway dam are opened and closed by being lifted or lowered in a vertical direction. When shut, the gates rest on the top of the ogee section, which is the upperline of the submerged stationary portion of the dam.

On the bed of the river, extending downstream across the width of the dam, is a concrete structure called the baffle deck. The baffle deck is dotted with concrete blocks called baffles which are built into the deck. The baffles serve to dissipate the energy of the water discharged through the dam and to re-

duce the downstream velocity thereof. In the interval between the completion of the dam in 1938 and the summer of 1954, the baffle deck and baffles had been eroded to some unascertained degree by the flow of water.

5. On June 23, 1954, the Contractor and defendant entered into a certain contract numbered DA-35-026-eng-20855, for construction of a cofferdam and restoration of baffles on south half of the spillway baffle deck. The contract contemplated that the construction of the cofferdam and restoration of the baffles would be carried on by the Contractor without interruption of the normal power generation of the powerhouse. It further contemplated that the construction of the cofferdam would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse. The Contractor's employees, including Graham, Boylan and Tobias, entered upon defendant's premises at and about project site while the spillway dam was in operation. The contract further contemplated that Contractor would inform defendant of all steps he proposed to take which would affect the operation of the spillway dam. By the terms of the contract, Contractor was to supply all equipment, including the tug and barge involved in these actions, and all labor used in the performance of the contract. The contract further con-

templated that operation of the dam, including operation of spillway dam gates, would be conducted by personnel of defendant.

6. On July 14, 1954, defendant gave the Contractor notice to proceed with the performance of the contract. Thereafter the Contractor commenced preliminary marshalling of equipment and construction materials on and in the vicinity of the project site. On August 13, 1954, defendant notified the Contractor that the water level of the river was such that, in accordance with Paragraph SC-1 of the contract, the Contractor was to commence construction work on the water no later than August 23, 1954. Prior to August 16, 1954, the Contractor had erected his field office and certain other work facilities on the defendant's premises.

7. On August 13, 1954, the Contractor personally conferred with Albert M. Capps, an employee of defendant and Project Superintendent in charge of the operation of Bonneville Dam, regarding the possibility of closing a number of gates of the spillway dam during preliminary construction work on the cofferdam. At that time, it was found possible to close Gates 11 through 17, that is, all the gates on the south half of the spillway dam from Gate 11 southward toward the Bradford Island side, except for the fishway gate, not material herein. Gates 11 through 17 were closed on August 13, 1954, and remained closed thereafter and during all times material herein.

8. On August 16, 1954, Patrick S. Leonti, an employee of the defendant and Construction Project Engineer under said contract, arrived at Bonneville. Leonti's duties, among others, were to inspect the project during the construction by the Contractor, in order to ascertain that the contractor was performing the contract in accordance with its terms. He also acted as liaison between the Contractor and those employees of the defendant concerned with operation of the dam. Leonti, between August 16, 1954, and August 20, 1954, familiarized himself with the project and conferred with Robert Larson and Harry Claterbos, Jr., Acting Superintendent for the Contractor, as to the Contractor's plans for carrying out the project. Leonti informed the Contractor that any requests by the Contractor for closing the gates in the spillway dam should be made through him and that he would relay such requests to the employees of defendant charged with operating the dam and its gates.

9. According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib. The timber crib was to rest in Bay 9, starting at the top of the ogee curve and running at right angles to the face of the dam. The crib was to rest on the curved slope, the ogee, and was to be built to fit that curve as nearly as reasonably possible.

10. The contract drawings showed the cross-section of the ogee as it had been originally con-

structed. The Contractor concluded that the ogee might have been eroded to some degree and that the cross-section of the ogee accordingly might not still be the same as when originally constructed.

The Contractor determined that it was necessary to take soundings of the ogee in Bay 9 for the purpose of establishing its true cross-section at that time. The contract specifications did not require nor did it refer to the taking of soundings in the project area:

11. On August 18, 1954, the Contractor's representative informed Leonti that the Contractor proposed to take soundings in Bay 9 on August 20, 1954. Leonti was informed that the Contractor intended to take a tug and barge out on the water below the dam to push the barge into Bay 9, and to take soundings off the side of the barge. The Contractor requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 P.M. of August 20, 1954, to facilitate the sounding operation. The Contractor did not request any gates to be closed other than 9 and 10. Leonti forwarded this request to the operations division of the dam and by 12:30 P.M. of August 20th, the gates in these bays had been closed. With the closure of Gates 9 and 10, Gates 9 through 17 were closed. The Contractor sought no advice from the defendant and the defendant gave the Contractor no advice as to the hazards of the proposed sounding operation.

12. The day before the proposed sounding op-

eration, the superintendent of the independent contractor performed a reconnaissance run in another tugboat in the same area on the Columbia River in which the accident occurred for the purpose of determining whether the proposed sounding operation was safe. Based on this reconnaissance run and his own personal observation of this situation, the independent contractor determined for himself, without seeking the government's advice or suggestions, that the proposed sounding operation was safe.

13. Shortly before 2:00 P.M. on August 20, 1954, Contractor's Tug Muleduzer, pushing the Contractor's Barge Forest No. 12, set out from the Bradford Island shore of the river. The equipment and personnel utilized in the proposed sounding operation were selected solely by the Contractor. The tug's crew consisted of Magnor Larson, Captain, and Henry Coles, deckhand, both of whom were employees of the Contractor. Also aboard were the members of the sounding party, consisting of Graham, Boylan and Tobias and a man named Lewis. Graham, Boylan and Lewis were in non-supervisory capacities and had no control with respect to the manner in which the sounding operation was to be conducted. Tobias was Civil Engineer in charge of this sounding operation for his employer, the Contractor.

14. The Tug Muleduzer is 50 feet long, has a 15-foot beam, draws $5\frac{1}{2}$ feet aft and $2\frac{1}{2}$ feet forward. It has two No. 671 GMC 165 horsepower diesel

engines which drive two 4-bladed bronze propellers through 3 to 1 reduction gears. The tug was pushing the barge, which was made fast to the tug by four steel lines. Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug and the other two lines ran from the stern mooring bits of the barge to the stern winches of the tug. So fastened together, the tug and barge were in effect a unit.

15. The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and headed upstream for Bay 9. As the barge came to Bay 9, it veered north and the port bow of the barge struck the pier between Bay 9 and Bay 8, stoving a hole in the bow of the barge. As water came in through the hole, the barge moved over in front of Bay 8 and the other open bays north of Bay 8. The barge and tug were swamped and sunk with the barge being broken to pieces. All those aboard the tug and barge were thrown into the water and all except Coles, the deckhand, were drowned.

16. The immediate cause of the accident and the deaths of the men was the turbulent condition of the water, which made it impossible to control the movements of the tug Muleduzer and barge and caused the barge to strike the pier.

17. At the time of the accident, Gate 8 was open two dogs so that the height of the aperture between the top of the ogee and the bottom of the gate was 32 inches; Gate 7 was open three dogs so that the

height of the aperture was 55 inches; Gate 6 was open two dogs so that the aperture was 32 inches high. These gates were all fifty feet wide and fifty feet high. The quantity of water being discharged from these gates at that time was approximately as follows: 5,700 cubic feet per second from Gates 8 and 6 and 9,100 cubic feet per second from Gate 7. At this time, the elevation of the forebay in the spillway dam was about 73.5 feet and the elevation of the tailrace below the spillway dam was 18.6 feet. The elevation of the crest of the ogee at the spillway dam was about 24 feet, as measured from a fixed reference point at the dam. All elevations are measured from a fixed reference point at the dam.

18. At the time of the accident, on August 20, 1954, the flow of the Columbia River was 191,100 cubic feet per second. Of this flow, 115,000 cubic feet per second was taken through the powerhouse, 52,300 cubic feet per second was being discharged through the spillway dam, 3,000 cubic feet per second passed over the fishway and 800 cubic feet per second was being ponded.

19. The turbulent condition of the water in the spillway basin was open, apparent and obvious to all, including the independent contractor, the operator of the tugboat and the other employees of the independent contractor. The difference in elevation of the water in the turbulent area opposite the open gates, as compared with the area opposite the closed gates in the spillway basin was also visible and obvious.

20. This accident and the deaths of the decedents occurred on navigable waters of the United States within the jurisdiction of the State of Oregon.

21. Robert C. Larson, doing business as Larson Construction Company, was an independent contractor and was not operating under the supervision, control and direction of the United States.

22. The government was under no duty by virtue of this contract, to provide the independent contractor with any materials, equipment or personnel. The government had no control of the details, manner or method by which the work under the contract was to be accomplished, but was interested only in the general result in conformity with the contract's specifications. The government retained a mere right to inspect the work of the independent contractor as it progressed in order to determine whether it was being completed in accordance with the plans and specifications.

23. The independent contractor selected its own equipment, including the tug and barge, and personnel for the proposed sounding operation and determined for itself the method, manner and means by which it would be carried out. No employee of the United States participated in this operation or gave the contractor or any of his employees any directions or orders with respect to the same.

24. There were no employees of the United States engaged in the sounding operation which resulted in the deaths of plaintiffs-decedents. There was no intermingling of employees of the United States

with employees of the independent contractor in connection with the work being performed at the time of the deaths of plaintiffs-decedents.

25. The government was not in charge of, responsible for or engaged in the work being performed by the independent contractor which resulted in the fatal accident.

26. Neither the United States nor any of its agents or employees was guilty of any negligent or wrongful act or omission proximately causing the deaths of plaintiffs-decedents.

27. Defendant was not an employer subject to the provisions of the Oregon State Workmen's Compensation Act.

28. Plaintiff-decedent Merle L. Tobias was the foreman in charge of and responsible for the particular work in which he and the other employees of the contractor were engaged at the time of the fatal accident.

29. The Contractor at the time of the death of Graham, Boylan and Tobias was insured by a qualified carrier against liability for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Neither the insurer nor the Contractor had given notice to the Deputy Commissioner that such insurance was in force and the Contractor had not otherwise secured the payment of such compensation as provided in 33 U.S.C. § 932. The statutory beneficiaries of plaintiffs-decedents, pursuant to their application, were

awarded and are presently receiving compensation under the Oregon Workmen's Compensation Act.

30. The beneficiaries under the Longshoremen's and Harbor Workers' Compensation Act of plaintiffs-decedents did not file any application for compensation under that Act, nor have they been awarded nor have they received any compensation under that Act.

31. The beneficiaries under the Longshoremen's and Harbor Workers' Compensation Act have not filed with or given notice to the Deputy Commissioner of the Bureau of Employees' Compensation of an election to bring an action for damages against some person other than the employer of plaintiffs-decedents as provided in 33 U.S.C. § 933(a).

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter of these actions.

2. Plaintiffs are not barred from bringing these actions by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

3. These actions for damages for the deaths of workmen occurring on the navigable waters of the United States within the jurisdiction of the State of Oregon are governed by the general maritime law, which applies within the jurisdiction of Oregon the Oregon Wrongful Death Statute, O.R.S. 30.020, but not the Oregon Employers' Liability Act, O.R.S. 654.325.

4. It would violate the United States Constitution to apply the Oregon Employers' Liability Act to these actions.

5. The United States was not responsible for the work being performed by plaintiffs-decedents so as to be liable to them under the Oregon Employers' Liability Act.

6. The Oregon Employers' Liability Act does not apply to these actions.

7. The deaths of plaintiffs-decedents were not caused by the negligence of the United States or its employees.

8. The United States is not chargeable with any negligent acts or omissions on the part of the independent contractor or his employees.

9. There was no breach of any duty owing from the United States or its employees to plaintiffs-decedents.

10. The United States is not liable to plaintiffs under either the Oregon Employers' Liability Act or the Oregon Wrongful Death Act.

11. The United States is not liable to plaintiffs under the Federal Tort Claims Act.

12. The United States is entitled to judgment.

Let judgment be entered accordingly.

These findings of fact and conclusions of law are in accordance with the Pretrial Order on Segregated Issues of Law, the pleadings, the record made

on the trial of these actions and the opinion of the Court filed in these consolidated cases.

Dated this 9th day of May, 1957.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed May 9, 1957.

In the United States District Court
for the District of Oregon

Civil 8041

HENRY L. HESS, JR., as Administrator of the
Estate of George William Graham, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil 8076

JAMES L. WINTON, as Administrator of the
Estate of Leonard L. Boylan, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil 8256

JESSIE G. TOBIAS, as Administratrix of the
Estate of Merle L. Tobias, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT

These cases (Nos. 8041, 8076 and 8256) were consolidated for trial before this Court, the Honorable

Gus J. Solomon presiding and sitting without a jury, the Court having previously reserved its decision on the questions of law submitted to it by the parties in connection with the Pretrial Order on the Segregated Issues of Law. The parties appeared by their respective counsel on December 3, 1956 and introduced evidence, both oral and documentary. The cases were briefed, argued and submitted to the Court for consideration and decision. After due consideration, the Court, being fully advised and having reached its decision and having made and filed its opinion and findings of fact and conclusions of law,

It is Hereby Ordered, Adjudged and Decreed that the plaintiffs and each of them take nothing by these actions.

Made and Entered this 9th day of May, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed May 9, 1957.

[Title of District Court and Causes.]

**MOTION TO AMEND FINDINGS OF FACT
AND OBJECTIONS TO CONCLUSIONS
OF LAW**

Come now plaintiffs pursuant to Rule 52 (b) of the Rules of Civil Procedure for the District Court, and move the Court as a separate motion by each paragraph and subparagraph hereinafter set forth,

to amend its findings made and entered in the above-entitled case, and to make other and additional findings as follows:

(1) To amend finding number 19 by adding thereto the following:

(a) "There is no evidence that the decedent George William Graham knew which bay the tug was going into with reference to its proximity to the nearest open gate, the power of the water and/or the power of the tug itself."

(b) "There is no evidence that the decedent Leonard L. Boylan knew which bay the tug was going into with reference to its proximity to the nearest open gate, the power of the water and/or the power of the tug itself."

(c) "There is no evidence that the decedent Merle L. Tobias knew which bay the tug was going into with reference to its proximity to the nearest open gate, the power of the water and/or the power of the tug itself."

(2) To amend finding number 19 by adding thereto the following:

After boarding the tug Muleduzer and putting out into the Columbia River the plaintiffs' decedents (a) Graham, and (b) Boylan, and (c) Tobias, were no longer in control of the situation and could not have turned back had they desired so to do.

(3) To amend finding number 23 by adding thereto the following:

(a) "The United States was however kept informed of the plans of the Contractor and knew of

the Contractor's plans to send his employees into Bay 9 in time to have closed Gate 8."

(b) "and it would have been practicable so to do without impairing the efficiency of the operations of the United States in the operation of said dam."

(4) To delete from finding number 24 the second sentence thereof and substitute the following:

"At all times material hereto the defendant was in full and absolute control of the situs of the work being performed by Contractor, the defendant's employees were in full charge of the operation of the dam, and the work being done by the Contractor would necessarily be affected by the actions of the defendant's employees in the operation of said dam."

5. To amend finding number 25 by adding thereto the following:

(a) "The government was however in the operation of its dam and in the production and transmission of electricity, an employer engaged in, in charge of, and responsible for, work involving risk and danger to employees and the public."

(b) "and the work being performed by the plaintiffs' decedents brought them within the scope of the danger created through the operations of the government in the operation of its dam."

6. To amend the Court's findings by deleting therefrom in its entirety finding number 26 as made, and substituting therefor the following:

(a) "The United States acting through its servants and agents owed a duty at common law to the

plaintiffs' decedents to conduct its own operation of the dam with due care and regard for the safety of plaintiffs' decedents, this the United States failed and neglected to do and the defendant is therefore guilty of negligence as at common law for failure to exercise reasonable care in view of the circumstances and the actual state of the defendant's knowledge regarding the plans of the Contractor."

7. The defendant was also guilty of negligence in violating the provisions of the Employees Liability Act of Oregon, O.R.S. 654.325, et seq. in that it failed to use every device, care, and precaution practicable to be used for the protection of Contractor's employees' lives and limbs in that it would have been practicable without impairing the efficiency of the defendant's operations,

(a) to have closed gate eight for a sufficient time to have allowed Contractor's employees to perform the duties assigned them in bay nine.

(b) to have furnished a safe working pool but the defendant failed so to do.

8. The negligence of the defendant, as aforesaid, was the proximate cause of the death of

(a) George William Graham

(b) Leonard L. Boylan

(c) Merle L. Tobias

And plaintiffs object to the Court's conclusions of law number 3 insofar as it concludes that the Oregon Employers Liability Act, O.R.S. 654.325

cannot or should not be applied to the facts of this case; conclusion number 4 in its entirety; conclusion number 5 insofar as it concludes that the defendant must have been in charge of the particular work being performed by plaintiffs' decedents in order to make the Oregon Employers Liability Act O.R.S. 654.325, et seq. applicable to the facts of this case; and conclusions numbered 6, 7, 9, 10, 11, and 12 in their entirety all for the reason and upon the grounds that the same are contrary to law and not in accordance with the facts.

/s/ GEORGE H. FRASER,

Of Attorneys for James H. Winton.

/s/ CLAYTON HESS,

Of Attorneys for Henry L. Hess, Jr.

/s/ RAY MIZE,

Of Attorneys for Jessie G. Tobias.

State of Oregon,

County of Multnomah—ss.

Due service of the within Motion to Amend Findings of Fact and Objections to Conclusions of Law is hereby accepted in Multnomah County, Oregon, this 17th day of May, 1957, by receiving a copy thereof, duly certified to as such by Clayton Hess of Attorneys for Henry L. Hess, Jr.

/s/ C. E. LUCKEY,

Of Attorneys for Defendant, United
States of America.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Causes.]

ORDER

This matter having come on regularly upon the motion of plaintiffs to amend the Findings of Fact and upon plaintiffs' objections to the Conclusions of Law, plaintiff Henry L. Hess, Jr. appearing by his attorney, Clayton Hess, plaintiff James L. Winton appearing by his attorney, Geoffrey C. Hazard, Jr., and plaintiff Jessie G. Tobias appearing by her attorney, Ray Mize, and the defendant appearing by Robert R. Carney, Assistant United States Attorney, and the Court having heard argument of counsel and being fully advised in the premises;

It Is Ordered that the motion of plaintiffs to amend the Findings of Fact and its objections to Conclusions of Law be and the same are hereby denied.

Dated this 27th day of May, 1957.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed May 27, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8041

HENRY L. HESS, JR., as Administrator of the
Estate of George William Graham, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

NOTICE OF APPEAL

To United States of America and C. E. Luckey,
United States Attorney for the District of Ore-
gon, and Robert R. Carney, Assistant United
States Attorney, its attorneys:

Notice Is Hereby Given, that Henry L. Hess, Jr.,
as administrator of the Estate of George William
Graham, Deceased, plaintiff above named, hereby
appeals to the United States Court of Appeals for
the Ninth Circuit from each and every part of that
certain judgment in favor of defendant entered in
this action on the 9th day of May, 1957, and from
the whole thereof, and from that certain Order
Denying Motion of Plaintiff to Amend Findings of
Fact and Objecting to Conclusions of Law, entered
on the 27th day of May, 1957, and from the whole
thereof.

Dated: July 9, 1957.

/s/ CLAYTON HESS,

Of Attorneys for Plaintiff-
Appellant.

[Endorsed]: Filed July 23, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents that Henry L. Hess, Jr., as administrator of the estate of George William Graham, deceased, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized and empowered under the laws of the State of Oregon to become surety on bonds, undertakings, etc., in the State of Oregon, are held and firmly bound jointly and severally unto defendant above named in the penal sum of Two Hundred Fifty and No/100 (\$250.00) Dollars to be paid to said defendant, its successors and assigns, for which payment well and truly to be made said Henry L. Hess, Jr., as administrator of the estate of George William Graham, deceased, and said Fidelity and Deposit Company of Maryland, and each of them, bind themselves, their successors and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such that Whereas said Henry L. Hess, Jr. as administrator of the estate of George William Graham, deceased, is about to prosecute an appeal to the United States Court of Appeals for the Ninth Circuit from a Judgment in favor of defendant, entered in the above-entitled action on the 9th day of May, 1957, and from the whole thereof, and from that certain Order Denying Motion of Plaintiff to Amend Findings of Fact and Objecting to Conclusions of Law, entered on the 27th day of May, 1957,

entered in the above-entitled action, and from the whole thereof.

Now, Therefore, if said Henry L. Hess, Jr., as administrator of the estate of George William Graham, deceased, shall prosecute said appeal to effect, and answer for all costs which may be adjudged against him if he fails to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, Sealed and Delivered this 28th day of June, 1957.

/s/ HENRY L. HESS, JR.,

As administrator of the estate of George William Graham, deceased.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

/s/ By CLARENCE D. PORTER,
Attorney in Fact.

Countersigned:

/s/ CLARENCE D. PORTER,
Resident Agent.

[Endorsed]: Filed July 23, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now, plaintiff-appellant, Henry L. Hess, Jr., as Administrator of the Estate of George William Graham, Deceased, and files the following

statement of points upon which he intends to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in favor of defendant, and from the order of the court overruling plaintiff's motion to amend the findings of fact and objecting to the conclusions of law, which judgment and order were made and entered herein:

1. The court erred in entering judgment in favor of the defendant.

2. The court erred in overruling plaintiff's motion to amend the findings of fact and objecting to the court's conclusions of law.

3. The court erred in finding, if it did so find, in Finding of Fact number 22 that the defendant retained only a mere right to inspect the work done by Larson Construction Company in the particular circumstances in which plaintiff's decedent was killed, namely, the danger involved in the open spillway gates.

4. The court erred in finding in Finding of Fact number 24 that there was no intermingling of employees of the United States with the employees of the contractor in connection with the work being performed at the time of the death of plaintiff's decedent.

5. The court erred in finding, if it did find, in Finding of Fact number 25 that the defendant was not in charge of, responsible for, or engaged in work involving risk and danger to employees of Larson Construction Company, including plaintiff's decedent.

6. The court erred in finding in Finding of Fact number 26 that the defendant was not guilty of any negligent or wrongful act or omission proximately causing the death of plaintiff's decedent.

7. The court erred in concluding in Conclusion of Law number 3 that this action was governed by the general maritime law which applies the Oregon Wrongful Death Statute rather than the Oregon Employers' Liability Act, O.R.S. 654.325.

8. The court erred in concluding in Conclusion of Law number 4 that it would violate the United States Constitution to apply the Oregon Employers' Liability Act to this action.

9. The court erred in concluding in Conclusion of Law number 5 that the United States was not responsible for the work being performed by plaintiff's decedent so as to be liable to him under the Oregon Employers' Liability Act.

10. The court erred in concluding in Conclusion of Law number 6 that the Oregon Employers' Liability Act does not apply to this action.

11. The court erred in concluding in Conclusion of Law number 7 that the death of plaintiff's decedent was not caused by the negligence of the United States or its employees.

12. The court erred in concluding in Conclusion of Law number 9 that there was no breach of any duty owing from the defendant or its employees to plaintiff's decedent.

13. The court erred in concluding in Conclusion of Law number 10 that the United States was not liable to plaintiff under either the Oregon Employers' Liability Act or the Wrongful Death Act.

14. The court erred in concluding in Conclusion of Law number 11 that the United States was not liable to plaintiff under the Federal Tort Claims Act.

15. The court erred in concluding in Conclusion of Law number 12 that the United States was entitled to judgment in the above entitled action.

/s/ CLAYTON HESS,
Of Attorneys for Plaintiff-
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 12, 1957.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now, Henry L. Hess, Jr., as Administrator of the Estate of George William Graham, Deceased, the plaintiff-appellant, and pursuant to Rule 75 of the Rules of Civil Procedure designates the following portions of the record, proceedings and evidence to be contained in the record on appeal.

1. Complaint.
2. Answer.

3. Stipulation for consolidation, filed February 28, 1956.

4. Pre-Trial order on segregated issues of law.

5. Stipulation of facts dated December 3, 1956.

6. Opinion, March 29, 1957.

7. Findings of fact and conclusions of law.

8. Judgment in favor of defendant.

9. Motion to amend findings of fact and objections to conclusions of law.

10. Order denying motion to amend findings of fact and objections to conclusion of law, May 27, 1957.

11. Notice of appeal.

12. Bond for costs on appeal.

13. Concise statement of points on which plaintiff-appellant intends to rely on appeal:

14. This designation of contents of record of appeal.

15. Condensed statement of testimony of Henry A. Coles, Kurt H. Sieke, Albert M. Capps and Patrick J. Leonti.

16. To be transmitted as physical exhibits, the following: Plaintiff's exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16 and 17.

/s/ CLAYTON HESS, .

Of Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 12, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Stipulation re consolidation of cases; Order consolidating cases; Pre-trial order on segregated issues of law; Stipulation of testimony of Harry Claterbos, Jr.; Stipulation of facts; Opinion of Judge Gus J. Solomon; Findings of fact and conclusions of law; Judgment; Motion to amend findings of fact and objections to conclusions of law; Order denying motion to amend findings of fact and its objections to conclusions of law; Notice of appeal; Bond for costs on appeal; Statement of points on which appellant intends to rely on appeal; Condensed statement of testimony; Designation of contents of record on appeal; Order for transmission of exhibits; Objections to narrative statement of testimony; Designation of additional portions of record to be included in the record on appeal; Order to forward exhibits to Court of Appeals; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8041, in which Henry L. Hess, Jr., Administrator of the Estate of George William Graham, Deceased, is the plaintiff

and appellant and The United States of America is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's partial transcript of proceedings of December 3, 1956. Exhibits 1 to 8; 10 to 19; 21; 22; 23 a, b, c, d; 24; 25; 26; and 27 will be forwarded under separate cover.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 26th day of August, 1957.

[Seal] R. DE MOTT,
 Clerk,

/s/ By THORA LUND,
 Deputy.

United States District Court
District of Oregon

Civil 8041

HENRY L. HESS, JR., as Administrator of the
Estate of George William Graham, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil 8076

JAMES L. WINTON, as Administrator of the
Estate of Leonard L. Boylan, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil 8256

JESSIE G. TOBIAS, as Administratrix of the
Estate of Merle L. Tobias, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, Monday, December 3, 1956

Before: Honorable Gus J. Solomon, District
Judge. [1]*

Appearances: Mr. Clayton R. Hess, Attorney for
Plaintiff Henry L. Hess, Jr., As Administrator of

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

the Estate of George William Graham, Deceased; Messrs. George H. Fraser and Geoffrey C. Hazard, Jr., of Attorneys for Plaintiff James L. Winton, As Administrator of the Estate of Leonard L. Boylan, Deceased; Mr. Herman P. Hendershott, of Attorneys for Plaintiff Jessie G. Tobias, As Administratrix of the Estate of Merle L. Tobias, Deceased; Messrs. Robert R. Carney, Graydon S. Staring, and Clifford C. Comisky, appearing in behalf of Defendant United States of America.

Court Reporter: Mr. Gordon R. Griffiths.

Mr. Carney: If the Court please, there are perhaps some preliminary matters. At this time I am handing up stipulations as to the facts because there is not a pretrial order in this case. The first document is a stipulation. It does not stipulate all of the admitted facts. The second is a stipulation as to the testimony of the witness Harry Clatterbos as to what he would testify if he were present today. We are not stipulating that they are the facts but that that would be his testimony. [2]

There is one other preliminary matter, and that is in order to clarify the record with respect to the Court's action on the segregated issues which were previously argued. If my recollection is correct, the Court took some of those under advisement and may have ruled on the first one. We thought it might be appropriate at this time to clarify the record in that regard so we would know what issues remain in the case. The first, really the first two segregated issues, pertained to the Longshoremen's and Harbor Workers' Act. The first issue was

whether or not this accident would be exclusively covered by the Longshoremen's Act. The second issue was whether it was necessary for the plaintiffs to have filed a notice of action against the third party with the Deputy Commissioner.

Do I understand correctly as to whether or not the Court has ruled on those issues, or have they been reserved, also?

The Court: No, I ruled on them. I ruled that this action could be maintained without having given notice to the Deputy Collector.

Mr. Carney: Well, then, the remaining point that has not been ruled on is the application or non-application of the Oregon Employers Liability Act to these circumstances, and that question has been reserved?

The Court: That is right. [3]

Mr. Carney: In order to preserve the record we desire to preserve the pre-trial on the segregated issues with the understanding that two of the questions have been ruled upon, and if it is necessary or appropriate to take exception for the record, we do that.

The Court: No, in my decision, whatever it may be, I am going to call attention to the issues. If I have the time, you will get a full-dress opinion on that point because it is an interesting question.

Mr. Carney: There is one other matter, a matter of formality. There are seven exhibits attached to the pre-trial as to the segregated issue. I believe all the parties desire to stipulate that those seven exhibits will remain part of the record and will be-

come the first seven exhibits at this trial. Is that so stipulated?

Mr. Hazard: Yes.

Mr. Hess: Yes.

Mr. Hendershott: Yes.

Mr. Carney: There is one other preliminary matter. I discussed it with attorneys for the plaintiff, and I understand that they are prepared to stipulate at this time that the contractor, Robert C. Larson, was an independent contractor in this case.

Mr. Hazard: So stipulated.

Mr. Hess: So stipulated. [4]

Mr. Hendershott: So stipulated.

The Court: So stipulated.

(Recess taken.)

HENRY A. COLES

a witness produced in behalf of Plaintiff Henry L. Hess, Jr., as Administrator of the Estate of George William Graham, Deceased, having been first duly sworn, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Hess): What is your address?

A. 16366 Southeast Alder.

Q. And your occupation?

A. Tugboat operator, tug operator.

Q. How long have you followed that occupation, Mr. Coles?

A. Oh, I have been operating tugboats for about a year and a half now. I was decking for approximately four years.

(Testimony of Henry A. Coles.)

Q. On August 20, 1954, what was your occupation? A. As a deck hand.

Q. How long had you been following the river and maritime employment before that?

A. Approximately four years.

Q. On August 20, 1954, you were employed by whom? [5]

A. Larson Construction Company.

Q. On that date what job did you have to handle?

A. Well, I was working as a deck hand on the Tug Muleduzer.

Q. Had the Tug Muleduzer been assigned any particular duty for that day? A. Yes.

Q. Would you state what you were to do on the tug that day?

A. We were to bring the barge from the upper forebay of the dam.

Q. You are referring to Bonneville Dam?

A. Bonneville Dam, yes, and we were to bring it around to below the spillways and tie it up at the Derrick Columbia, and then we were to pick up a crew from shore and take them out with the barge and take some soundings of the spillway of the dam.

Q. Approximately what time of the day did you start your trip from the forebay?

A. It was right around noon.

Q. You had reached the position below the dam about what time?

A. Oh, about quarter to one.

(Testimony of Henry A. Coles.)

Q. Was it below the dam that you tied onto the barge that was involved in this accident?

A. Well, the first time?

Q. Where did you tie on, and about what time and how did you [6] tie on for the trip out along the face of the dam that resulted in this catastrophe?

A. Well, that was, oh, approximately a quarter to two we picked up a crew from shore, and then we went back out to the Columbia where this barge was tied off, and we made up to the barge.

Q. Would you describe how you made up to the barge?

A. Well, the barge was laying up and downstream, and, as we wanted to go downstream and make an upstream approach, we secured the upstream end of it. We ran out two bow lines, steel cable bow lines to cleats on each corner, and then there were two steel lines from the stern to the same cleats on the corner of the barge, which gave us four lines holding the barge and boat together as a single unit.

Q. After you had made up the barge with the tug, would you describe the course you took to proceed out, and, incidentally, where were you to proceed to first?

A. There was a marking on the dam, and we were to proceed into the bay that was to the right of this marking, and we were to hold the barge in there and take soundings of the curvature of the dam.

(Testimony of Henry A. Coles.)

Q. What was the condition of the dam with reference to whether or not the gate was open on the gate immediately to the north of the bay into which you were to proceed?

A. It was open. [7]

Q. Will you describe the course taken by the tug and barge in the trip out to that bay?

A. Well, we cut loose the barge from the derrick, and we proceeded downstream and made a turn to the right, swinging around, coming back upstream, and we were off to the Oregon side, and we proceeded on kind of an angle towards the Washington side, allowing for the turbulent current in there and wind because there was a certain amount of set that they had to allow for, and by the time we got up to the bay we had slid just right and entered right into the bay there.

Q. You were not then proceeding straight upstream at this time?

A. No, it would have been impossible to have made a proper landing in there.

Q. Why would that be?

A. Why, if you would come up there straight up there, your current and your wind would set you sideways. You would have to turn your barge, and you would be all out of shape and wouldn't be able to make a proper landing. You would come in at an angle and damage your barge. This way, if you would come and set sideways, you would come right in there, and the full weight of the barge would hit all at the same time, and you wouldn't do damage to your barge.

(Testimony of Henry A. Coles.)

Q. As you proceeded upstream at this angle toward Bay 9—what was your position on the tug or barge as you proceeded? [8]

A. At the time we approached the dam I was up forward on the barge.

Q. Would you be forward on the barge or to the rear of the barge?

A. Well, I would be up forward, pretty near as far forward as I could get there where I could watch.

Q. As you proceeded at this angle into Bay 9 did you observe whether or not there was a drift one way or the other?

A. Well, not until we got, oh, to within maybe a hundred yards of the dam.

Q. When you got within a hundred yards, what did you observe?

A. Well, we was moving too fast, for one thing, to come into a landing like that, and I motioned to the skipper to lay off, and he kept moving at about the same rate of speed, and I motioned him to back up, and we didn't seem—our boat didn't seem to slow down any too much.

Q. Could you tell whether or not he had done anything to the motors to slack up or back up?

A. Well, you could tell when he slacked down there from the forward pushing motion, but as far as putting it in reverse and throttling up, it would be kind of hard to tell right there under those conditions of your noise and water and such.

Q. Do you have any signals that you give to

(Testimony of Henry A. Coles.)

indicate to [9] the skipper to slow up and back up, and if so what are those signals?

A. Well, usually in coming in for a landing I will just motion, you know, left or right or which way I want him to turn. If I want him to let her drift, I just give a signal like that (indicating). If I want to back up, I put my hand like that (indicating). If I want him to speed up, I go like that (again indicating).

Q. Was it the practice for the skipper to obey these signals? A. Yes.

Q. As you were approaching there, did you notice whether or not there was a drift either toward the right toward the Oregon shore, or a drift toward the left toward the Washington shore?

A. A drift toward the Washington shore, that's right, the Washington shore, forward towards the Washington shore in toward the turbulent water.

Q. Will you just describe in your own language the actions of the tug and barge, then, from this point of approximately a hundred yards when you noticed that you thought you were coming in there too fast.

A. Well, when I noticed that we were coming in too fast I motioned to Mag. to put the engines in reverse.

Q. Mag., by that you refer to 'Magner Larsen'?

A. Yes, the skipper. [10]

Q. Go ahead.

A. To put the engines in reverse and to back up on her, and I seen that we were still moving

(Testimony of Henry A. Coles.)

pretty fast, so I give him the hi-ball sign to open her up, and by that time we had moved in pretty close, and it didn't seem to have slowed it down any, and in the last desperation I just really opened her up to give her everything she had got, and that was just before we hit the pier on the dam, and when we hit we hit with force enough that I could hear the timbers breaking in the front of the barge.

Q. What portion of the barge hit the dam?

A. Oh, I would guess probably, oh, maybe 10 feet in from the left-hand corner.

Q. It hit what portion of the dam?

A. On one of the piers that come down, the cement piers.

Q. Before you hit the dam what, if anything, did you observe with reference to the condition of the water?

A. Oh, it was rough, turbulent. That was immediately below the spillway there.

Q. How would you characterize that turbulence? Would you say it was mild, severe, heavy, or what?

A. Well, if you got into it, it would be severe.

Mr. Carney: I object to that. I think he can describe it without expressing an opinion as to some non-technical term as to the degree of turbulence. [11]

The Court: Objection overruled. Go ahead and testify. What was the degree of turbulence?

The Witness: Oh, it was, up close to the dam it was plenty rough in there. It was rough when you go to get into it with a boat.

(Testimony of Henry A. Coles.)

Q. (By Mr. Hess): Did you observe anything with reference to the current of the river as to whether it was flowing downstream at that portion, back toward the dam in a circular motion, or what?

A. Well, farther down from the dam, say a hundred or two hundreds yards, your current was going downstream—well, probably closer than that, and the closer you got your water started to boil, and the closer you got to the dam, why, then, she kind of boiled and rolled back in towards the face of the dam.

Q. With particular reference to where the tug and barge were located, were you in the place where the water was going downstream, or were you in a place where the water was boiling back toward the dam?

A. Well, right where, say, about the stern end of the tug it would—I would say it would be kind of about medium right there. I mean your water would be boiling. It would be going neither forward or back maybe. It would put us about 100 to 130 feet from the face of the dam; maybe not that much; 120 feet. [12]

Q. That is when you say you were back 130 feet from—

A. I think, but the power of your boat, where your propellers are at, that is where all your power is at.

Q. I take it you are saying that the stern of the tug would be about 130 feet back from the face of the dam at the time you bumped; is that correct?

(Testimony of Henry A. Coles.)

A. Yes, sir.

Q. After you bumped the dam, will you describe the action of the barge and the tug?

A. Well, immediately after hitting, the barge bounced back to a certain extent, and I ran back to the boat, knowing that we had already stove a hole in the barge, and went back to tell the skipper that we should get her ashore, beach it, you know, before the barge would sink; and I ran back and told him that, and as I turned around and looked the barge had started to work its way underneath the spillway. It was being pulled underneath, and then I ran around behind the cabin and grabbed an ax and came back up forward, showed the skipper I had an ax in my hands ready to cut the lines loose, and we stood there for a moment or so and the barge kept being pulled right underneath the dam, and the boat swung in right alongside it parallel with the dam.

Q. When you say the barge was being pulled under the dam, being pulled by what, what factor?

A. With the force of your flow. In some way the turbulence [13] of the water was sucking it right underneath.

Q. After you observed this action of it being pulled under the face of the dam, I take it you are talking now about the spillway dam? A. Yes.

Q. And water spilling out of the dam?

A. Yes.

Q. Was it actually spilling onto the barge at that time? A. Yes.

(Testimony of Henry A. Coles.)

Q. After you observed that, will you continue with your narrative.

A. Well, after we were pretty near parallel with the dam the skipper gave me a signal to go ahead and cut the lines, and being a danger to the stern hitting the piers and the dam there and damaging the wheels and losing all control of the boat in there, I cut the starboard stern line first, which would allow our stern to swing downstream and keep the propellers away from any piers, in half-way decent water, and then I tried to cut the port stern line, and we were bouncing around pretty good then.

Q. I couldn't hear you?

A. After cutting the starboard stern line, then I went and tried to cut the port stern line, and it had gone slack. It was a little difficult for me to try to cut it by myself, and Mr. Tobias grabbed hold of the cable and held it straight [14] so that I could cut it, and I cut the port stern line, and then I went forward and tried to cut the bow lines.

By that time the barge was pulled under the dam, and it was pretty much, quite a ways underneath there, and it was so rough that if I had let go of the railing of the boat and tried to jump off forwards to the bow and severed those lines with an ax I would not have been able to stand up and take a swing with the ax anyway.

Q. This roughness that you describe, was that up and down, sideways; both?

A. It was up and down more or less.

(Testimony of Henry A. Coles.)

Q. Approximately how high were you going up and coming down, would you say?

A. Oh, I would guess about probably five or six feet.

Q. Was that a fast or slow action?

A. Well, it wasn't either one. It was just kind of the boat would go up, the barge would go down, and the barge would go up and the boat would go up, and the cables would come up taut on it and jerk, and with the hope that those bow cables would break at that time under those conditions. They should have and usually do. We have had them break under a lot less roughness than that, the waves of a ship break them, but this time they didn't.

Q. Then you went forward, did you, in an attempt to sever some of the bow lines? [15]

A. That was my intentions, yes.

Q. Were you able to get those severed?

A. No.

Q. What prevented you from severing them?

A. The roughness of the boat. I couldn't have stood up or took a swing with that ax if I wanted to. It would have just either throwed me overboard or throwed me down on the deck. I would not have been able to do no good.

Q. Was this a continuous process of the tug and barge being continually sucked under or—

A. All the time, yes.

Q. Would you describe what happened then

(Testimony of Henry A. Coles.)

after you went forward and tried to sever the bow lines?

A. Well, seeing that I couldn't stand up and do any good, I just grabbed hold of the railing on the front of the bow and just hoped that those lines would part from that violent surge of the water and the boat going up and down, and they didn't, and the first thing, you know, the water hit the side of the boat and threw me into the water right into the dam.

Q. The water that you are speaking of, was that the water from the Gate 8 that was open?

A. Yes.

Q. Mr. Coles, you have testified with reference to the condition of the water at the stern of the tug at the time [16] you hit the pier, but I believe you testified further that the tug and barge got swung around so that it was almost parallel to the face of the dam. Would you describe the condition of the water as you observed it to be as you got alongside of the dam, parallel to the dam?

A. Well, I would say that it wasn't too bad. If we could have got the boat cut loose, it probably would have backed out of there.

Q. What was that?

A. I say, if I had got the boat cut loose, it probably would have been able to back out of that type of water where the stern was in at that time. It wasn't so—as turbulent. It was kind of——

Q. But what was the action of the water at the

(Testimony of Henry A. Coles.)

spot where the barge was? In other words, what was the motion of the water?

A. At what time?

Q. As the tug and barge swung parallel to the dam after having holed the barge.

A. Yes.

Q. What was the action of the water where the barge was in front of the closed gate?

A. Well, it wasn't—it was kind of whirlpools. It wasn't turbulent water.

Q. And the whirlpool was moving in what direction? [17]

A. Well, I never paid that much attention to it. I didn't take time to see which direction they were going.

Mr. Hess: You may inquire.

Cross Examination

Q. (By Mr. Carney): Who was aboard the tug and barge on the day that you went on this operation?

A. Mag. Larsen, the skipper, myself, Mr. Tobias, Boylan, Lewis and Graham.

Q. Which of these people consisted of the crew of the tugboat?

A. Mr. Larsen and myself.

Q. There was no other deck hand besides yourself on the tugboat?

A. No.

Q. Who was in charge of the party; that is, who was the party who gave the captain of the tugboat directions as to what to do?

A. Mr. Tobias.

Q. What did he say? Did you hear a conversa-

(Testimony of Henry A. Coles.) •

tion between Tobias and Magner Larsen, the captain of the tugboat? A. Yes.

Q. What did he tell him to do?

A. Well, he explained what he was supposed to do, was to [18] take the barge out there and put it into this bay which was—at the time he pointed out it was—a pier out there had a yellow mark on it, and we was to put it into the bay to the right of that, and in that way we couldn't make mistakes, and it happened to be the one just to the right of the first active spillway of the dam at that time, and I was standing there, I usually tried to listen to the instructions given to Mr. Larsen because at times he may be a little confused. He would ask me if I heard, and if I did I would tell him, and that way both of us would know what was going on.

Q. Then is it correct that Tobias told him to put the barge into the first bay that was not spilling water?

A. That would be about it, yes. He never said those exact words.

Q. Is the result that it was the first bay that was not spilling water?

A. Well, I was definitely sure that he said to the right of the pier with the yellow mark, which was the one that was—it was the first dead bay towards Oregon from the Washington side.

Q. What kind of lines were used to tie the tug and barge? A. Steel cable lines.

(Testimony of Henry A. Coles.)

Q. How many axes were there aboard the tugboat? A. Two.

Q. Were any instructions given by you or the captain of the [19] tugboat, or Mr. Larsen, or anybody to any of the other people aboard in the use of the axes in case the situation became endangered? A. Not that I know of.

Q. What was your answer?

A. Not that I know of. Nobody got any instructions that I know of in the use of those.

Q. Were you present at all times?

A. Yes.

Q. Were any lines taken aboard the tugboat or the barge to be used to tie the barge into the bay by any means? A. No.

Q. By what method was the barge going to be held in this bay? A. By boat power.

Q. How long had you know Captain Magner Larsen, the captain of the tugboat?

A. I had know him about four years.

Q. How many years?

A. Approximately four years.

Q. Were you with him on the tugboat during those years? A. Yes; not continuously.

Q. Where were you operating?

A. Around Astoria, in Astoria and Portland.

Q. Had you ever operated in the upper reaches of the Columbia [20] River up around Bonneville Dam or any of the other dams? A. No.

Q. You were down on the tidal waters around Astoria? A. Yes.

(Testimony of Henry A. Coles.)

Q. Was it after a hole was stove in the barge that the barge took water and started to move north, or did it start to moving north before that?

A. Well, it was in the process of moving north when we hit.

Q. Well, then, what occurred immediately after you hit?

A. Well, just went back a little bit and continued going right in underneath and pulled in underneath the spillway.

Q. Was the barge taking water after it struck the pier?

A. Evidently. I couldn't swear to it. I didn't get down there and look.

Q. Were there any Government employes aboard the tug and barge at this time? A. No.

Q. Were there any Government employes present at the time the barge left the shore?

A. I don't believe so.

Q. Did any Government employes give either you or Captain Larsen any instructions before going out? A. No.

Q. How were the steel lines attached between the tugboat [21] and the barge?

A. Well, on the tug we have winches on there, hand winches, and they run out through blocks up to cleats on the barge, which we had eyes spliced in the end of the cables.

Q. Will you describe how these winches operated?

(Testimony of Henry A. Coles.)

A. They are a hand crank with a steel dog in them, and you just crank them up.

Q. Do these hand winches have a break on them? A. Yes.

Q. What was the condition of the brakes on these hand winches at the time of the accident?

A. Oh, they would work to a certain extent, like you could take—if you had a taut line, you would take a strain on your winch and pull your dog and hold your break back by hand and probably take your hand crank out and then release it.

Q. Were the hand winches, the brakes on the hand winches, in such condition that they could hold the strain of the line? A. No.

Q. In other words, to release the line from the winch it would be necessary to take a strain in order to get the dog out? A. Yes.

Q. What was your answer as to what was the condition of [22] the brakes?

A. They were satisfactory for so far as letting go under normal conditions, but in rough water, well, it would be kind of a touchy situation, a good chance of busting your arm.

Q. What was the condition as to how old they were? Were they worn? Were they new brakes?

A. Oh, no, no, no; the winches had probably been on there for probably four or five years or so, maybe longer. I don't know.

Q. Were the brakes pretty well worn? What was the condition of their wire?

(Testimony of Henry A. Coles.)

A. They were pretty well worn, yes.

Q. If the brakes had been in good condition, would it have been possible to hold a strain on the line with the brakes and then just simply reduce the dog by lifting it out?

A. Possibly. Under a jerking condition I don't know.

Q. After the Tugboat Muleduzer was raised following this accident did you continue to work on it? A. Yes.

Q. Was anything done to the winches that were aboard? A. Yes.

Q. What was done? A. We replaced them.

Q. I would like to hand you Exhibit No. 14. I don't believe [23] these exhibits have yet been marked, but perhaps during the recess we can take care of the marking.

The Court: Very well.

Mr. Carney: Pardon me; that is Exhibit 16. I ask that the witness be handed Exhibit No. 16.

(Exhibit referred to presented to the witness.)

Q. (By Mr. Carney): Does this picture represent what you observed as to the condition of the water immediately downstream from the spillway dam at the time of the accident?

A. I would say so, yes.

(Exhibit immediately above referred to was thereupon marked Government's Exhibit 16 for identification.)

The Court: I think we would be better off to

(Testimony of Henry A. Coles.)

pass the pictures at this time and go to something else. During the recess exhibit the pictures to counsel for plaintiff. Then we can proceed more quickly.

Q. (By Mr. Carney): Who was your employer? By whom were you employed at this time?

A. Larson Construction Company.

Q. Were any safety meetings held by Larson Construction Company in connection with this project?

A. The work at the dam?

Q. Yes, the work at the dam. In other words, to rephrase my [24] question, prior to this accident were any safety meetings held which you attended which were held by your employer?

A. I believe there was one that I attended myself.

Q. Was there any discussion at this safety meeting with respect to the waters around the dam?

A. No, I don't remember. I couldn't recall.

Q. What was the subject—what was discussed at the meeting then?

A. Well, it was more or less the fellows, as far as their helmets and having to wear their life-jackets in working around the water, and there was some of the other shore union grievances, nothing to do with the towboat. We just stayed in there because we had to.

Mr. Carney: We have no further cross examination.

The Court: Let us take a recess until 1:30.

Mr. Hazard: Before we adjourn, your Honor, there is one other formal matter. I have made a typed copy of a regulation relating to navigation, 33 Federal Code Regulations, which Counsel previously agreed this could be introduced for judicial notice.

The Court: Very well.

(Noon recess taken.) [25]

Afternoon Session

(Court reconvened at 1:30 o'clock P.M., pursuant to the noon recess, and the trial of the matter was resumed as follows):

HENRY A. COLES

a witness produced in behalf of Plaintiff Henry L. Hess, Jr., thereupon resumed the stand and testified further as follows:

Further Cross Examination

Q. (By Mr. Carney): At this time would the witness be handed Exhibit No. 16. At this time the parties desire to stipulate that all of the exhibits that have now been marked, which are Nos. 1 through 26, be admitted without objection.

Mr. Hess: There was one question about that.

(Discussion by counsel off the record.)

Mr. Carney: Well, Exhibit No. 20 is a sealed exhibit for impeachment purposes only.

The Court: Then it is not admitted. Exhibit 20 is not admitted. It is just marked just as it is.

Mr. Carney: It is Defendant's Exhibit 20.

The Court: Your exhibit?

(Testimony of Henry A. Coles.)

Mr. Carney: Yes, your Honor.

The Court: Take it back.

Mr. Carney: There are two other clarifications, your [26] Honor. Exhibit No. 9, which is the deposition of Mr. Larson, is not admitted in evidence. It is an impeachment document, so I will hold it back.

Also, part of Exhibit No. 8; Exhibit No. 8 consists of three depositions. Two of the depositions, that of Patrick Leonti and that of Grover Goebel, are admitted as evidence. The third deposition in the same folder is that of Mr. Capps, which is simply for impeachment purposes because he may be called as a witness. There is no way to divide that conveniently.

The Court: Very well, 9 is not admitted; and 8, that portion of the exhibit relating to—give me the names.

Mr. Carney: Patrick J. Leonti and Grover Goebel.

The Court: Those are admitted. The other portion of the exhibit is not admitted.

(Defendant's Exhibits 1 through 7, inclusive, those parts of Defendant's Exhibit 8 dealing with the testimony of Patrick J. Leonti and Grover Goebel, and Defendant's Exhibits 10 through 19, inclusive, and Defendant's Exhibits 21 through 26, inclusive, having been previously marked for Identification, were thereupon received in evidence.)

[See Exhibit No. 8 at page 147.]

(Testimony of Henry A. Coles.)

Q. (By Mr. Carney): The witness has Exhibit No. 16, and I [27] will ask this question, as to whether this picture is a true representation of what you observed as to the condition of the water on the downstream side of the spillway dam on August 20, 1954, at the time of the accident which is the subject of this case?

A. Well, approximately. It could be a little more turbulent on this still-water side.

Q. A little more turbulent on the still-water side? A. Yes.

Q. That is the side which would be represented by the south side of the spillway dam?

A. That's right.

Q. I will hand you Government's Exhibit No. 15. To clarify your last answer, you said there was more turbulence on the south or Oregon side. Was that more turbulence in the picture or more turbulence at the time of the accident?

A. At the time of the accident.

Q. More turbulent at the time. In other words, was this turbulence visually observable?

A. Yes, it looked more choppy to me than what it does in this picture.

Q. You could observe the turbulence from the tugboat?

A. Well, I was out forward on the barge, yes, and from the tug.

Q. And from the tugboat, also. Referring you now to Exhibit [28] No. 15, I will ask you what does it represent?

(Testimony of Henry A. Coles.)

A. Well, that looks just about like approximately the day that we went up there, about the same conditions, except these gates here are closed (indicating on exhibit).

Q. Let me ask you this question: Aside from the fact that one or possibly two gates are indicated as being closed there on the north half of the dam, and referring your attention particularly to the water before the dam, does this picture truly represent what appeared and what you observed on the date of the accident?

A. Well, it would be kind of hard to say.

Q. With respect to what the water looked like.

A. It—well, yes, it would be approximately the same.

Mr. Carney: We have no further questions.

Redirect Examination

Q. (By Mr. Hess): Mr. Coles, from the time when the barge first hit the pier and stove a hole—and a hole was stoved in the barge, from that time until the time the tugboat moved under the flow of water from open gates and heeled over, about how much time would you say elapsed?

A. Not more than five minutes.

The Court: I didn't hear that. About five minutes?

The Witness: Not over five minutes. [29]

Q. (By Mr. Hess): Could you tell approximately how much time elapsed from the time you

(Testimony of Henry A. Coles.)

first hit the pier until water started spilling onto the barge?

A. Well, right after we hit a certain amount of water landed on the front of the barge. There was water coming down on it.

Q. Is that water from the spillway you are speaking about? A. Yes.

Q. Then this period of not more than five minutes that you are speaking of was the time that it took the flow of water to suck the tug all the way; is that correct? A. Yes, sir.

Mr. Hess: No further questions.

Mr. Carney: No further questions.

The Court: I wonder if you could mark on either Exhibits 15 or 16 the point at which the tug came in contact with the pier.

Mr. Carney: Your Honor, the question whether the tug or the barge, or either one.

The Court: It is the barge, I think, that came in contact. Just mark on the one, preferably No. 16.

(Witness marks on exhibit.)

The Court: Show it to Counsel.

(Exhibit presented to Counsel.)

The Court: Call your next witness.

(Witness excused.) [30]

KURT H. SICKE

a witness produced in behalf of Plaintiff James L. Winton, as Administrator of the Estate of Leonard L. Boylan, Deceased, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Fraser): State your full name, Mr. Sieke.

A. Kurt H. Sieke.

Q. What business or profession are you in?

A. I am a consulting engineer and associate professor of hydraulic engineering, fluid mechanics, at the University of Portland.

Q. Would you state in general what engineering fields are covered by that title of hydraulics and fluid engineering?

A. The subject refers to the hydraulics and dynamics of fluids in quiet condition or in motion, the energy developed by fluids in motion, the pressures developed, the velocities, quantities of flow, and just about all the aspects of fluid motion and energy.

Q. How long have you been an associate professor at the University of Portland?

A. Four years.

Q. How long have you been a licensed engineer pursuant to the laws of the State of Oregon?

A. Thirty years. [31]

Q. Do you hold licenses in other states besides Oregon?

A. Yes, I am licensed in Washington and California and several of the Eastern states.

Q. The subject under inquiry, Mr. Sieke, is the

(Testimony of Kurt H. Sicke.)

Bonneville Dam. Will you state whether or not you have ever had an occasion to work on a dam structure the size of Bonneville Dam?

A. No, sir; I haven't.

Q. Will you state whether or not you have ever had an occasion to be called as a consulting engineer or engineer in charge of dam construction in general?

A. Yes, I designed and supervised the construction of the gate structures and the power canal for the Crown-Zellerbach Company at Lebanon and the hydraulic power gate structure and canal for the Crown-Zellerbach Company at Camas, a siphon structure for the Ranier Corporation at Port Angeles, a low-level dam across the Santiam River at Lebanon, and other similar projects of that kind.

Q. Mr. Sicke, I am going to ask you to assume certain facts that are in evidence in this case: No. 1, that on the date of the accident in question, August 20, 1954, the forebay of the dam, that is, the height of water in the forebay, is approximately 73 feet; the tailrace, the height of the tailrace is 18 feet, 6 inches; the crest of the ogee is approximately 24 feet. This data is taken from a common [32] reference point. At that time the Gate No. 8 was open to dogs, which would be approximately 32 inches. That is the opening of the aperture of the gate which water was coming through. The gate is 50 feet wide.

From that information, are you able to express an

(Testimony of Kurt H. Sicke.)

opinion as to the velocity with which the water was coming through Gate 8? A. Yes, sir.

Mr. Frazer: Would you hand this to the witness.

(Document presented to the witness.)

Q. (By Mr. Fraser): What numbers were given to those?

The Clerk: 27 and 28.

Q. (By Mr. Fraser): Have you made a computation with respect to that information for me, Mr. Sicke? A. I have.

Q. What is your answer to that question?

A. Approximately 42 feet per second was the velocity of the water as it passed under the gate.

Q. Would you translate 42 feet per second, which amounts to the velocity that the water was moving into there, into miles per hour?

A. Very close to 30 miles per hour.

Q. Have you made a computation based on the same information for Gate No. 7 which was open approximately 55 inches?

A. The velocity is only slightly different. [33] It would be just slightly less, but for all practical purposes it would be also about 30 miles per hour or 42 feet per second.

Q. Assuming that that Gate No. 8, that the water is moving through it, I think, at a rate of approximately 5,700 cubic feet per second. In terms of weight, how much weight would be moving through that gate?

(Testimony of Kurt H. Sieke.)

A. It would be 356,000 pounds of water discharged by the gate per second.

Q. Assuming, Mr. Sieke, that Gate No. 8 is discharging water at the rate you have just testified to; that Gate No. 7 was discharging approximately 9,100 cubic feet per second; that Gate No. 6 was discharging water at approximately 5,700 cubic feet per second, and that the remaining gates were discharging water—I should say the remaining gates on the north half of Bonneville were discharging water at approximately the same rate of 5,700 cubic feet per second, with the exception of possibly Gate No. 1 and the fishway—are you able to express an opinion as to the actions of the current immediately below the spillway and immediately adjacent to the spillway?

Mr. Carney: If the Court please, I do not believe you would have sufficient data to express that opinion. Have you stated as to what each gate was spilling?

Mr. Fraser: I have attempted to paraphrase it from the basis of the records, Counsel, I think. [34]

The Court: Let the witness answer, and then if he wants to interrogate him, that is all right. Go ahead and answer the question.

The Witness: Well, in my opinion, in such a large body of water as the Columbia River and the tremendous quantities being discharged and the resulting stream turbulence below the open gates, it would be very difficult to give any definite statement

(Testimony of Kurt H. Sicke.)

as to velocities in any direction. It is a very, very turbulent flow.

Q. (By Mr. Fraser): I will ask you, are you able from the information that I have given you to diagram the principal currents that an engineer, a qualified hydraulics engineer, would expect might result; not the velocity of those currents, but the principal currents, if any? A. Yes.

Q. Can you step to the blackboard and make such a diagram?

(Thereupon a brief recess was taken.)

Mr. Fraser: For the purpose of clarification, your Honor, and Mr. Carney, I am referring now to Plaintiff's Exhibit No. 4, and the information I am asking you to predicate your opinion on, Mr. Sicke, is at Gate No. 1. That is on the extreme north side of the Bonneville Dam, and that is a fishway gate and was open eight inches; Gate No. 2 was open nine or one dog; Gate No. 3, two dogs; 4, two dogs; 5, two dogs; 6, two dogs; 7, three dogs; 8, two dogs; and on [35] all of those dogs the first dog is nine inches, the second dog is an additional 24 inches, and each dog thereafter is an additional 24 inches.

I will ask you, Mr. Sicke, on the basis of that information and the other information I have previously outlined to you, if you could diagram the primary action of the currents immediately below the spillway of the dam, assuming that all other gates on the dam that I have not referred to are

(Testimony of Kurt H. Sieke.)

closed with exception of Gate 18, which is a fish gate on the extreme south side which was open eight inches. A. Yes, sir.

Q. Would you step to the board and just hastily indicate the current actions that you would anticipate?

A. These gates are the first eight gates open to various degrees. The flow of the water under the gates is discharged at the velocity of in the range of 30 miles an hour, but that velocity is rapidly reduced for two reasons. There are a series of submerged baffles under the water across the entire face of the dam, and those baffles retard the velocity of the water being discharged, which automatically increases the depth of the water, and those two actions result in a much reduced velocity within a hundred feet of the dam. Nevertheless, velocities of flow in excess of even five miles an hour are considered to have great significance in stream data. Those velocities have a tendency to draw the [36] quiescent water, the original quiescent water, adjacent to the rapid water into the flow. The velocities at a considerable distance from the dam are now very, very much reduced, and there is a great deal of turbulence under the water which passes over the dam, is unable to pass down the bed of the stream, so there is a tendency to circulate at a slow speed. This is a tremendously big circulation because the stream is approximately a thousand feet long, nine hundred and some feet, and the di-

(Testimony of Kurt H. Sicke.)

iameter of the circulation is therefore five or six hundred feet. It is therefore somewhat hard to observe, but just from the hydraulics of discharge there is a condition favorable to such circulation, and it is almost certain to occur.

Q. In addition to the circulation as you have described it just now, is there any other type of circulation in terms of vertical circulation?

A. Definitely. Within the distance from the gate to the submerged baffles there is a rolling circulation which causes a current in the vicinity of the dam itself, a current which flows toward the spillway. In other words, there is a vertical circulation which on the surface creates a current toward the spillway.

Q. I will ask the Bailiff to hand you Exhibit No: 16.

(Exhibit referred to presented to the witness.) [37]

Can you determine from that picture, Mr. Sicke, Exhibit No. 16, any vertical circulation?

A. I would hesitate to say that one can, except as your judgment, engineering judgment, shows that it must exist by reason of the differences in elevation and the common characteristics of flow of this kind. In other words, hydraulics is a very definite science.

Q. Would you point out to the Court the difference in elevation that you are referring to in the picture?

A. Yes. There is quite a noticeable line of demar-

(Testimony of Kurt H. Sicke.)

cation between the water behind Gate 9 and the very turbulent water being discharged under the open gate. It is possible to detect the currents which show that this water surface, the turbulent water surface beyond Pier 8, is below the level of this water, the quiet water behind—I shouldn't say quiet water, but the moving water behind the closed gates.

The Court: You mean the turbulent water is below the smooth water; is lower?

The Witness: Yes, sir; there is a definite difference in elevation in this turbulent area. It would be better illustrated by the diagram that I have made here.

Mr. Fraser: You may examine. [38]

Cross Examination

Q. (By Mr. Carney): Well, then, this turbulence which you have just testified exists opposite the gates which are closed, is it correct to say that that is apparent and obvious and can be observed by a person looking at the water? A. Yes, sir.

Mr. Carney: We have no further questions.

The Court: Do you have a diagram that you prepared in your possession now showing the difference in height of the water?

The Witness: You mean this diagram which would approximate the height of the surface? Yes, sir.

The Court: Has that been marked?

Mr. Fraser: No, I did not have that marked.

(Testimony of Kurt H. Sicke.)

The Court: If there is no objection, could we have that marked?

Mr. Carney: I have not seen it, your Honor.

Mr. Fraser: I did have it marked. I had not offered it nor intended to offer it.

(Document presented to counsel for defendant.)

Mr. Carney: (Referring to document): You mean all of this?

The Witness: Just the top sheet there is the one the Judge is referring to. [39]

Mr. Carney: We have no objection that it be entered as an exhibit.

The Court: We are going to admit that.

(Document referred to immediately above marked Plaintiff's Exhibit 27 for Identification and received in evidence.)

Mr. Carney: There is another one here, No. 28. We object to this. I do not think any basis has been made for this yet.

The Court: It has not been offered?

Mr. Fraser: I have not offered it.

(Witness excused.) [40]

ROBERT C. LARSON

a witness produced in behalf of Plaintiff James L. Winton, as Administrator of the Estate of Leonard L. Boylan, Deceased, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q: (By Mr. Hazard): Mr. Larson, on the date

(Testimony of Robert C. Larson.)

of August 20, 1954, is it not correct that you were doing business as Larson Construction Company?

A. That is correct.

Q. I believe that you are generally familiar with the issues in this case, and it was your company that was the employer of the individuals who were killed in that barge sinking about which we have talked here? A. Yes.

Q. Mr. Larson, can you tell us what facilities you had established at Bonneville, if any, on the date in question, August 20, 1954?

A. What facilities? We had a work yard located approximately, oh, a thousand feet below the dam adjacent to the powerhouse where we had constructed warehouses and an office and some—

Q. Was that on the Bonneville Dam site?

A. That was on what they called Bradford Island.

Q. Bradford Island as a whole, is it not a part of the [41] Bonneville site under the Corps of Engineers? A. Yes.

The Court: Were you master of the tug on this date?

The Witness: No.

The Court: That is a different Larson?

The Witness: That is right; Magner Larsen.

Mr. Hazard: That is a different man, your Honor. He was killed in the accident.

The Court: He was killed in the accident?

The Witness: Yes.

(Testimony of Robert C. Larson.)

Q. (By Mr. Hazard): Can you tell us what other facilities? Did you have a work shack there?

A. Yes, we had several work shacks and storage warehouses and an office.

Q. Were all of those located on Government premises at Bonneville? A. Yes.

Q. Approximately how many employes did you have on hand at this date?

A. I don't remember the exact number. I think there was somewhat over 100 in each shift.

Q. How many shifts were you working?

A. We were working three shifts, I believe.

Q. How did the men get to work?

A. Mostly in their own cars. [42]

Q. They came on the Bonneville premises in their own cars? A. Yes.

Q. Is it correct that some came across the spillway dam from Washington and others came through the powerhouse dam on the Oregon side when they came to work?

A. That is correct. I believe at the time there were some from Washington. I am not sure of that.

Q. Is it correct that you had—if I understand your testimony, you had about 100 men 24 hours a day; is that correct? A. I believe so.

Q. By way of employes; and all of those men were performing their work on the Bonneville premises; is that correct?

A. Well, those men who were on the premises were performing their work there. There may have

(Testimony of Robert C. Larson.)

been some other men possibly hauling equipment, something like that.

Q. But the bulk of those men were doing the work there? A. That is right.

Q. Was that the case, they would come in and around the facilities, the facilities of the Government itself, the powerhouse, spillway dam, and so forth? A. Yes.

Mr. Carney: I object to this line of questioning. I do not think it is material.

Mr. Hazard: I am not sure it is material, your Honor. [43] If the defendant wishes to stipulate that intermingling is immaterial in this case, that intermingling of employees is not required, I do not think it is.

Mr. Carney: If this is based on the question of intermingling, the only material evidence would be whether there is any intermingling of the witness' employees with Government employees at the site of the accident and not at numerous other places in the vicinity of Bonneville Dam.

The Court: Confine your interrogation to intermingling of employees in connection with the actual work that was being performed at this particular time.

Mr. Hazard: All right, your Honor.

Q. The Government liaison officer was a man named Patrick Leonti; is that correct?

A. That is correct.

Q. Did he have occasion to come to see you at

(Testimony of Robert C. Larson.)

your work shack during the week prior to August 20, 1954? A. Yes.

Q. Was that on more than one occasion?

A. I believe so.

Q. Where with respect to the spillway dam is that work shack? A. Ours?

Q. Your work shack.

A. Approximately a thousand feet downstream.

Q. It is on Bradford Island?

A. That is correct.

Q. And it overlooks the spillway dam?

A. Yes.

Q. Did you have occasion to go and visit Mr. Leonti at his quarters? A. Yes.

Q. Where were those quarters?

A. They were in the second floor of the dam tower. I don't recall the name for it.

The Court: What position did Mr. Leonti occupy?

Mr. Hazard: I believe the stipulation of facts shows, your Honor, that he was the construction engineer for the defendant, the United States, and in charge of superintending the contracts.

The Court: What was Mr. Larson?

The Witness: I was the contractor.

The Court: It is quite hard to get intermingling of the employees when you have a contractor talking to the resident engineer. That does not look like employees under the Rorvik case.

Q. (By Mr. Hazard): Mr. Larson, did any of your employees have occasion to have conferences with Mr. Leonti?

(Testimony of Robert C. Larson.)

Mr. Carney: Your Honor, I object to this line of questioning. I think the intermingling should be confined to the [45] scene of the accident and on the day that it occurred and the functions that were being performed at that time if he desires to show this for the purpose of intermingling.

The Court: I do not think he has to do it precisely on the morning of the accident, but I do not think that he can have the Administrator of Bonneville, for example, talking to the employes there and call that intermingling.

Mr. Hazard: This man is not the chief of the dam by any means. He is a liaison officer. I think the stipulation shows a construction engineer.

I would suppose, for example, take the Rorvik case where he was a ship captain. I would not suppose it makes any difference if the person has a position of authority as long as it is an employe.

The Court: I do not believe it, but I am going to listen to the testimony anyway.

Q. (By Mr. Hazard): Did your employes have occasion to have conferences with Mr. Leonti?

A. There was myself and my superintendent, Harry Clatterbos, who talked to him. To my recollection, I don't believe others had talked to him. He had just arrived at the job approximately a week or so before that. I don't recall anybody else having talked to him.

Q. Harry Clatterbos was one of your employes; is that correct? [46]

A. Yes.

(Testimony of Robert C. Larson.)

Q. They had conferences at the work shack?

A. Well, I believe we three did. I don't recall that Harry and Mr. Leonti particularly had conferences other than when I was with them.

The Court: What position did Mr. Clatterbos occupy?

The Witness: He was my superintendent.

Q. (By Mr. Hazard): Mr. Larson, can you tell us how—the physical process by which the gates and spillway dam are moved, in your own knowledge, how that is done? A. Yes.

Q. Can you tell us how that is done?

A. There are two large gantry cranes, or they are also called hammerhead cranes, I believe, and those are used, those are run on tracks on top of the dam. There is a track on each side of the dam, and these run on these tracks, and they roll over at a fairly slow rate of speed, and they drop down their lines and hook onto the gate itself and lift it up.

Q. They pull it up from the top of the gate with a hook on the line. That line is attached to this gantry crane as you have described it?

A. Yes.

Q. I show you Exhibit 15 (presenting exhibit to the witness). I see in that picture what appear to be two cranes across the [47] top of the dam. Are those the cranes you are speaking of?

A. That is correct.

Q. Who operates the gantry cranes, Mr. Larson? A. The Corps of Engineers.

(Testimony of Robert C. Larson.)

Q. Their personnel? A. Their personnel.

Q. Is there a man in the cab of that; is that where he is?

A. Well, there is a man or men in the cab.

Q. Is there a man or men down on the deck of the dam? A. I don't really know that.

The Court: Are there any further questions?

Mr. Hazard: We are just conferring, your Honor.

(Discussion off the record.)

Q. (By Mr. Hazard): Mr. Larson, there are three dead men in this case, George William Graham, Leonard L. Boylan and Merle L. Tobias. They were all your employes, were they not?

A. That is correct.

Q. Start with Mr. Graham. Can you tell us, if you know, what his rate of pay was at this time?

The Court: What difference would that make?

Mr. Hazard: That would go to the issue of damages, your Honor.

The Court: I thought we had segregated the issue down to liability here.

Mr. Hazard: I had not so understood. [48]

Mr. Carney: I believe at the last time we were before the Court it was decided we would also put on evidence of damages, but as far as I am concerned that can be postponed if it helps matters.

The Court: It does not make any difference to me. I think probably the amount of damages would be substantial if the plaintiffs are entitled to recover. Proceed.

(Testimony of Robert C. Larson.)

The Witness: Mr. Graham's rate of pay was \$3.25 an hour. He originally started working for me in 1953, and his rate at that time, I believe, was \$3.10, but for purposes of this job it was \$3.25.

The Court: What was his occupation?

The Witness: He was a carpenter foreman.

The Court: How old was he?

The Witness: Close to 50, I believe.

Q. (By Mr. Hazard): Did he receive any subsistence allowance in addition to that sum?

A. None.

Q. How long had he been in your employ?

A. He started working for me in 1953, in July.

Q. Can you tell us about Mr. Boylan, his rate of pay?

A. Mr. Boylan's rate of pay was \$2.75.

Q. That is per hour?

A. Per hour. He started working for me at about the same time as Mr. Graham. He worked under Mr. Graham most of the [49] time.

Q. How about Mr. Tobias?

A. Mr. Tobias started working for me on approximately a week or ten days before the accident.

Q. What was his position?

A. He was what you might call an expediter. He also had engineering experience.

Q. A trouble-shooter or something like that?

A. Not so much a trouble-shooter as an expediter in endeavoring to help us find needed materials or scarce materials.

Q. An expediter in the sense that it is often

(Testimony of Robert C. Larson.)

used in governmental circles, somebody trying to find, locate needed materials and the like?

A. That is right.

Q. What was his rate of pay? Did you testify to that?

A. As I recall, I think his weekly earnings, I believe it was \$400 a month.

Q. He was on a salary basis?

A. Yes, salary basis.

Q. What were Mr. Tobias' duties at the time this trip out on the barge was undertaken?

A. To make measurement of the ogee, which is the curve of the spillway, to determine if there was any wear.

Q. Or erosion; is that correct? [50]

A. Right.

Q. I take it he was in charge of the party; is that correct?

A. Well, yes, I would say so. There wasn't anybody actually set up as foreman in charge; but he was in charge as far as measurement was concerned.

Q. Did he receive any orders from anyone in particular of your employes?

A. Well, from myself and Mr. Clatterbos; he had come in the office, and we discussed the job with him and told him what was to be done.

Q. You told him the manner and method, how he was supposed to go out there, and the like?

A. I can't recall the details. I am sorry.

The Court: Is it stipulated that the Government

(Testimony of Robert C. Larson.)

did not give any orders to Mr. Tobias or to anyone out on the tug?

Mr. Carney: We would so stipulate.

The Court: I mean was it so stipulated?

Mr. Carney: We will so stipulate if the other parties will. I think that is the fact.

The Court: I thought there was a stipulation of that kind?

Mr. Fraser: I believe that is covered in the stipulation, your Honor. [51]

Mr. Carney: That is correct, as a matter of fact, that there were no orders given by the Government to perform this work or how it was to be done, this particular part; is that correct?

Mr. Hazard: That is correct.

The Court: Are there any further questions? Any questions from you, Mr. Carney?

Mr. Carney: I have a number of questions.

Cross Examination

Q. (By Mr. Carney): You say Mr. Graham had worked for you previously on other jobs besides this one? A. Yes, sir.

Q. What was the nature of that work? What kind of work was it?

A. Mostly hatchery work, hatchery construction and hatchery reconstruction.

Q. Were these temporary contracts or individual contracts that he was working?

A. Well, one contract was with the State of Washington, Department of Fisheries. Another one was with the State of Oregon, the State Fish Commission.

(Testimony of Robert C. Larson.)

Q. Is it correct to say that he was regularly employed by you, or did he just work each time you got a contract? [52]

A. Well, I had continuing contracts during that year's period, but I would say that he would work for us during the contract period. He was not a regular employe as such.

Q. Were you the owner of the Tug Muleduzer?

A. Yes, sir.

Q. Were you owner of the barge, Osburn 12, that was used in this operation? Where did you get the barge?

A. From Pacific Contracting Company.

Q. Were you then operating both the tug and the barge in connection with the performance of this contract? A. Yes.

Q. Were you using it for any other purposes outside of this contract? A. No.

Q. Then would it be correct to say that this tug and barge that was involved in this accident were operated exclusively for the use of the United States in connection with the performance of this contract? A. Yes.

Q. With respect to the method by which this survey or measurement operation was to be performed, was the method and the means and the equipment and the personnel that was used selected by your company, the contractor, or did the Government have anything to do with the selection of equipment, personnel, and the means by which it was done? [53]

(Testimony of Robert C. Larson.)

A. It was done by ourselves.

Mr. Carney: We have no further questions.

The Court: That is all.

(Witness excused.)

(Testimony of Betty Graham, Lydia L. Boylan, Jessie G. Tobias and George G. Graham was taken but omitted from the transcript.)

The Court: Are there any other witnesses?

Mr. Fraser: No other witnesses, your Honor. These depositions are to be offered.

The Court: As I understand it, there is no pre-trial order any more.

Mr. Carney: That is correct, your Honor; there is no pre-trial order.

The Court: Were the facts admitted in the statement of facts in the pre-trial order on the segregated issue?

Mr. Carney: They have all been restated in this stipulation.

The Court: You have a stipulation?

Mr. Carney: Yes; which was handed up at the beginning of the trial.

Mr. Fraser: With the exception of those matters going only to the questions raised at that time, your Honor, we have [54] attempted to restate everything for this issue.

The Court: Do you want to offer some depositions?

Mr. Fraser: Well, I have forgotten what exhibit it was, but the deposition of Mr. Leonti and Mr. Goebel.

The Court: That is already admitted in evidence.

Mr. Fraser: You said to hold it back.

The Court: No, just the one.

Mr. Fraser: All right.

Mr. Carney: This one is in except for Capps.

The Court: Do the plaintiffs rest?

Mr. Fraser: Yes.

Mr. Hess: Yes.

Mr. Hendershott: Yes.

(Plaintiffs rest.)

Mr. Carney: At this time, your Honor, we would like to make a motion to dismiss the case because I do not think the plaintiffs have made out a cause of action against the Government, and they have failed to show any employee of the Government under the terms of the tort claims act who was negligent in any regard which proximately caused this accident.

The Court: I have not read the depositions. The depositions might show it, and I am not going to start reading [55] the depositions now. I am going to take the motion under advisement. Call your witnesses.

Mr. Carney: We will call Mr. Capps. [56]

ALBERT M. CAPPS

a witness produced in behalf of Defendant, United States of America, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Carney): Will you state what your occupation is, Mr. Capps?

(Testimony of Albert M. Capps.)

A. I am Superintendent of Operation and Maintenance of Bonneville Dam, Bonneville Project.

Q. How long have you been so engaged? How long have you been at Bonneville Dam?

A. Nineteen years last June.

Q. How long have you been in charge of Bonneville Dam?

A. It will be two years last August.

Q. Will you describe in general what the layout of Bonneville Dam is with respect to the relationship of the powerhouse and the spillway. First, will you describe the powerhouse. Of what does the the powerhouse consist?

A. The powerhouse consists of ten main turbines and one small turbine. They are located on—built across the Bradford Slough between Bradford Island and the Oregon shore.

Q. What is the normal capacity in feet per second of flow of the river that can be taken, that is taken through the powerhouse?

A. It would be on the order of 130,000 cubic feet per second. [57]

Q. With an elevation in the forebay of the powerhouse of approximately $72\frac{1}{2}$ or 73 feet and with an elevation of the tailrace at the powerhouse of approximately 18.6 feet, approximately how much water would be taken through the powerhouse to generate power?

A. I believe about 130-33,000 second-feet.

Q. With those same conditions, if the flow of the river was approximately 190,000 feet per sec-

(Testimony of Albert M. Capps.)

ond, what would have to be done—or what would be done with the excess water that would not be taken through the powerhouse?

A. Well, a small portion of it, about 3,000 second-feet, would go down the fishways, and the balance of it would have to be spilled by the spillways.

Q. If it was not spilled over the spillway dam, what would occur if all gates were closed and none of it was spilled? What would occur?

A. Well, we would flood out the upstream pool.

Q. Would you describe what is the normal elevation of the upstream pool which is referred to as the forebay; what is the normal elevation at the spillway dam at the forebay?

A. We try to maintain forebay elevation of about 73.0. It can vary up about a foot or down a couple feet, two or three feet.

Q. If any gates are on seal or closed on the spillway dam, what is the maximum elevation you can possibly have at the [58] forebay of the spillway dam? A. 74.

Q. 74 would be maximum?

A. That would be maximum; not desirable, however.

Q. Why isn't it desirable?

A. Well, there should be a little room left to handle sharp, quick changes in load on the powerhouse, if something happens, so that we can disconnect from the load. We have to take care of the water that is shut up at the powerhouse.

Q. Will you explain that in a little more detail

(Testimony of Albert M. Capps.)

as to what is meant by losing a load on the powerhouse?

A. If circuit breakers open up due to line trouble or line fault and disconnect Bonneville from the load center, it leaves the generators running without any load, and they will have to shut down, shut the water off the turbines; otherwise you have a runaway.

Q. In other words, if the load is taken off the turbines, it is necessary to have no flow through the powerhouse at all? All the water flow of the river would have to be spilled over the spillway dam or retained in the pool; is that correct?

A. That has virtually occurred.

Q. Has this ever occurred as an actual fact?

A. Oh, over the years, pretty near every year we lose a substantial part of a load sometime or other. Sometimes it [59] is only part of the plant load, maybe seven out of ten units. Sometimes we only lose the load out of, four out of ten units. Once or twice, I believe, in the past we have lost the load on all ten units.

Q. Is there any other reason to have a margin of safety in the forebay elevation?

A. Well, something may arise where it would be rather urgent that you be able to close the dam for a short period of time.

Q. By closing the dam, which part of the dam do you mean?

A. The spillway dam, to close the spillway for

(Testimony of Albert M. Capps.)

a short period of time, and so we try to maintain a little room.

Q. I would like to have you handed Exhibit No. 4.

(Exhibit referred to presented to the witness.)

Will you state what is Government's Exhibit No. 4?

A. This is a log of the spillway gate openings by bays. It refers to what we call dogs, which means that when a gate is raised there is a latch dropped down and the gate set down on that latch, and if you raise it two dogs it would go up to the second notch on the gate and be latched at that point, and it illustrates the dam changes, what bays and what gates were changed and how much.

The Court: What is the purpose of this testimony?

Mr. Carney: The purpose of this testimony is getting at the point of showing whether it was necessary to expel [60] water at the time of this accident and whether possibly to close down all gates for a very short time because of the flow of the river and the part that was to be taken through the powerhouse and the part that would have to be expelled. That is the purpose. I would like to have the witness also handed Government's Exhibit 17.

(Exhibit referred to presented to the witness.)

Q. From Government's Exhibit 17, what was the flow of the river on August 20, 1954?

(Testimony of Albert M. Capps.)

A. 191,100 cubic feet per second.

Q. What part of that was taken through the powerhouse?

A. 115,000 cubic feet per second.

Q. What happened to the rest of it?

A. 800 cubic feet per second was ponded.

Q. What does that mean?

A. It was left in the forebay, held over.

Q. In other words, there was part that was not being spilled?

A. It raised the elevation slightly.

Q. What happened then to the rest?

A. 52,300 cubic feet per second were discharged through the spillway dam. 3,000 cubic feet per second were passed over the fishways.

Q. Immediately after this accident occurred I understand that all of the gates at the spillway dam were closed. Would [61] you refer to Exhibit No. 4.

A. Yes, sir.

Q. Referring to Exhibit No. 4, can you state whether or not all the gates were closed, as a matter of fact?

A. All of them but those two gates on the end that were open eight inches only.

Q. How long did it take to close all of the remaining gates, which were Gates 2 through 8, after the accident occurring at 2:00 o'clock? What time were all of the gates down?

A. The last gate was closed at 3:45 p.m.

Q. Would you explain why it takes an hour and forty-five minutes to close all those gates?

(Testimony of Albert M. Capps.)

A. The gates are quite heavy. They weigh 240 to 250, up to 290 tons each. There are 350-ton cranes that handle them, and, consequently, the cranes are big and cumbersome and very slow.

Q. How was this time in connection with as fast as they are usually closed: do you know? Was this fast or slow?

A. It was as fast as could possibly be done that day.

Q. When were any of the gates again reopened after they were all closed at 3:45?

A. At 4:45 the first gate was opened.

Q. How many dogs? A. Four dogs. [62]

Q. When was the next one opened?

A. 5:00 p.m.; two more dogs.

Q. What was the next?

A. Bay 2; 5:15 p.m., two dogs; 5:30, two dogs.

Q. Would you explain why it was necessary to immediately reopen these gates?

A. Well, we were rapidly filling up that little storage room that was available in the forebay, and it is extremely undesirable and unsafe to take the water over the top of the gates. We had to spill the water under the gates.

Q. About on August 12th or 13th, 1954, did you have a conversation with Mr. Larson?

The Court: August what?

Mr. Carney: August 13, 1954, which would be approximately a week before the accident.

The Witness: I did.

(Testimony of Albert M. Capps.)

Q. (By Mr. Carney): What was the conversation about?

A. Let's see, August 13th, I believe that is the day that we looked over the stilling basin at the spillway.

Q. If that is the case, I want to go back perhaps to the day before. Did you have a conversation with Mr. Larson with respect to closing some of the gates or all of them at the spillway dam?

A. That is right; I think that occurred about August 12th when Mr. Larson asked me if we could close off the south half [63] of the dam and let him see how turbulent the water was and how—whether or not he could work in there.

Q. What did you tell him at that time?

A. I told him that we could, I would check and survey the situation, and probably we could close the south half of the dam for observation.

Q. Was the spillway dam closed then on about August 13th?

A. It was August 13th.

Q. By the south half we mean Gates 11 through 17; is that correct?

A. That is right.

Q. Then after the Gates 11 through 17 were closed, did you thereafter have a conversation with Mr. Larson at the scene of the spillway dam?

A. Yes.

Q. What was the conversation?

A. Well, Mr. Larson and I looked over the tail-race, and he wanted to know what I thought about how safe it would be to work or if you could work there, and I told him that with that much turbu-

(Testimony of Albert M. Capps.)

lence I didn't see how he could work in there, and he asked me what I thought about bringing the derrick barge in there. I told him I thought if they brought a derrick barge in and kept close to the south shore and moored it at the south retaining wall that it could be done all right. [64]

Q. Thereafter was a derrick barge actually brought in and moored at the training wall on the south side of the dam?

A. It was. I believe it came in on the 19th.

Q. For clarity here, the derrick barge is not the barge that is involved in this accident; is that right?

A. That is right.

Q. Did you have any conversation with Mr. Larson at that time with respect to making the measurement for the survey which was the subject of this accident?

A. No.

Q. Was there any conversation as to where the construction was actually going to commence with relation to the dam?

A. I can't recall particularly. I believe it was pointed out to me, possibly by Mr. Larson or someone or maybe when we were just talking at the time there, that the work would start at—near this retaining wall at the south end of the spillway.

Q. Opposite which gate would that be?

A. Well, that would be opposite Gate 17.

Q. Would you explain as to whether it would have been possible to draft the forebay of the spillway dam; that is, to overspill for a period and then to thereafter be able to have the gates closed for a

(Testimony of Albert M. Capps.)

period? What is involved in an operation of that kind?

A. To do that you would have to overspill at night or one [65] period and close off the water another period. You would have to overspill to get the pool down low enough so that when, the time you have the gates closed you won't overflow or flood the forebay. It is possible to—

Q. Was that considered in connection with this general construction job, not the particular operation of going out and surveying this bay, but generally in connection with this construction project?

A. It was considered when we first closed the south half of the dam. It was considered.

Q. What plan of action was agreed upon or planned?

A. Well, it was decided to overspill at night, which would virtually double the spill for a period of hours, would be more detrimental with his deriek barge in the tail bay than it would be to discharge the normal flow and hold it continuously.

Q. Why would it be more detrimental to the situation in the tailrace?

The Court: The situation in the tailrace?

Mr. Carney: The tailrace is the area immediately downstream from the spillway dam. It is the area where this accident occurred, and I want to know why this excessive spilling at night would be more detrimental in that area than the plan of action of spilling through Gates 2 to 9 during the entire 24 hours. [66]

(Testimony of Albert M. Capps.)

The Witness: To give them eight hours' working time, it would require probably just about double, maybe a little more than double the normal spill through the open gates, and that would increase the turbulence in the eddy maybe not exactly in proportion to flow but substantially in that direction, and with his derrick barge tied up along the shore if he was working in there, it would be still more equipment in there, and it seemed the most desirable condition to keep the discharge at a minimum, which would mean we would have to discharge 24 hours continuously.

Q. What effect would spilling in advance in order to close off all of the gates for even a short time have upon the power output at the powerhouse?

A. At this particular head, it would be detrimental. Part of the dam would be down to a lower head. We would lose—we would have to draft the forebay two or three feet, and it is worth about eight—~~about~~ 16,000 kilowatt-hours per foot, which we would lose, and then at that time the demand for power was well up to the point where it would require all available capacity at Bonneville, and would lose generation if we fluctuated the pool.

Q. Would any planning or anything have to be done with any other agencies besides the operators of the dam if this were to occur because of loss of power?

A. We would have to make arrangements with the marketing [67] agency, Bonneville Power Administration, and possibly they may have to make

(Testimony of Albert M. Capps.)

some arrangements to get steam power or possibly drop some load or get someone else to carry the load for us. I don't know what arrangements they could make at the time, but they have to explore that and work out the most economic replacement.

Q. At any time did either the contractor or anyone else ask that all of the gates in the spillway dam be closed?

A. I don't believe it was ever asked if we could close them all.

Mr. Fraser: You are referring to prior to the accident, Counsel?

Mr. Carney: At any time prior to the accident on August 20th.

The Witness: No.

Mr. Carney: You may cross examine.

Cross Examination

Q. (By Mr. Fraser): Mr. Capps, you spoke of ponding of water. I think you said you were ponding at the rate of 800 cubic feet per second?

A. That is right.

Q. Was that on the day the accident occurred?

A. That is a 24-hour average on the day the accident occurred. [68]

Q. Can you tell me how long it takes ponding, we will say, let's take a round figure, 1,000 cubic feet per second? How long does that take to raise the forebay one foot?

A. Well, 1,000 second-feet would not raise it very much. Let's see, 1,000 second-feet, to raise one foot that would be only about a tenth a day.

(Testimony of Albert M. Capps.)

The Court: I did not hear.

The Witness: It would raise it about—1,000 second-feet would raise it about one-tenth of a foot per day.

Q. (By Mr. Fraser): Let's take a figure like 6,000 cubic feet per second. How long would it take it to raise half a foot?

The Court: The testimony is that they were letting over 50,000 cubic feet go through the gates when they were ponding 800.

Mr. Frazer: That is precisely it, your Honor; they were letting 5,700 cubic feet per second come through on Gate 8, they were ponding at the rate of 800, and so the total is 6,500.

Mr. Cairney: It was not coming into Gate 8.

Mr. Fraser: 5,700 was coming into Gate 8, and my point in this line of testimony is solely for the purpose of pointing out that Gate 8 could have been shut down for a minimum of six hours without going over the normal limit of 74 in the [69] forebay.

The Court: Suppose that they had closed Gate 8. What would have happened, Mr. Capps?

The Witness: Let's see, 57,000 per second-feet—

Mr. Fraser: 5,700, Mr. Capps.

The Witness: 5,700, excuse me. That would be—it would take about five hours to fill up one-tenth.

The Court: One-tenth?

The Witness: Tenth of a foot.

(Testimony of Albert M. Capps.)

Q. (By Mr. Fraser): The reading that day was 73 plus? _____

A. 73.5 at that time of the day. Just a minute; maybe I got it here (consulting document)—73.0.

Mr. Fraser: I am reading here now from—has this been introduced in evidence? (Referring to document.) I ask the Clerk to hand this to the witness. If it has been introduced, it has not been marked, so I will ask that it be marked.

Mr. Carney: It should be marked as 26, I believe. It should be 26.

(Document above referred to marked Plaintiff's Exhibit 26 and handed to the witness.)

Q. (By Mr. Fraser): Mr. Capps, referring to the first paragraph in that exhibit, I think there is a definition of a normal river flow there, 260,000, up to 260,000 cubic feet per second? [70]

A. That is right.

Q. And that the average height of the forebay would vary between—is it 72 and 74?

A. 70 and 74.

Q. 70 and 74, so that the figures that we are dealing with on August 20th were within normal limits, were they not?

A. Considered normal. This stream flow, however, is normal compared to flood.

Q. Yes, but actually on August 20th you were only handling 191,000? A. That is right.

Q. Considerably less than the maximum 260 in your description of normal stream flow.

Going back now to the conversation that you had

(Testimony of Albert M. Capps.)

with Mr. Larson with regard to, is it the Barge Columbia?

A. I believe that was the name of it.

Mr. Carney: Derrick barge.

Mr. Fraser: Derrick Columbia. Do you remember what day that was that you looked at this? Was it the tailrace that you looked at?

A. At the spillway. I believe that was, that was the evening after—of the day that we had closed the south half of the dam.

Q. Was that the day that you decided that he could tie along there safely? [71]

A. That is right.

The Court: With the derrick barge?

The Witness: He could tie the derrick barge to the south training wall. If he stayed in close, he could bring the derrick barge up there and tie it to the south training wall.

Q. (By Mr. Fraser): What was that again, the south what? A. Training wall.

Q. Adjacent to the south training wall?

A. Bay 18 on the right, Bay 17 upstream in front of it.

Q. Bay 17 was closed at that time, wasn't it?

A. That is right.

Q. And Gate 18 was what?

A. Gate 18 was open 8 inches.

Q. And was discharging how much water per second?

A. Oh, we figured about 500 second-feet, something like that.

(Testimony of Albert M. Capps.)

Q. Which is considered in this case the discharge at Gate 8 on August 20th?

A. Yes, that is right.

The Court: Why couldn't you have closed Gate 8 altogether?

The Witness: Well, we could, but it was the water—it made the water for the fishway entrance, and we had that [72] open to give a velocity exit at the fishway entrance for—

Mr. Carney: I think you misunderstood 18 for 8. He asked you why Gate 8.

The Witness: Oh, Gate 8.

The Court: The bay.

The Witness: Bay 8?

The Court: Bay 8, what gate was at Bay 8?

The Witness: Gate 8 or Bay 8?

The Court: Which ones had already been closed?

The Witness: We closed—

The Court: 9 to 17?

The Witness: We closed, let's see, first we started out with 11 to 17.

Mr. Fraser: You can refer to your record there which shows exactly.

The Court: 11 to 17?

The Witness: That was first.

The Court: Then what else did you close?

The Witness: Well, then, on that particular day of the accident they asked us to close 9 and 10, Bay 9 and Bay 10, which was done.

Q. (By Mr. Fraser): State what time the closures were effected. A. 12:30 p.m.

(Testimony of Albert M. Capps.)

Q. Both gates or just—— [73]

A. Both gates.

Q. Then when was the next closure?

A. The next closure, it was after the accident at 2:30 p.m.; Bay 8.

Q. What gate was closed then? A. Bay 8.

Q. How long was it before another gate was closed after Bay 8 was closed?

A. Oh, it was about a half-hour before we got Bay 3 closed, and Bay 3 and Bay 7 were closed simultaneously.

Q. Let me ask you this question, Mr. Capps: If you had received a request to close Gates 10, 9 and 8, could you have closed those gates?

A. Yes, I think we could have closed another one. We closed the two they asked for without any hesitancy. If you had got into any more, we would have probably made inquiries as to how long they wanted them closed to see where—if we could accommodate them.

Q. Mr. Capps, as I understand it, you are operations officer at the dam, and with respect to gate closures on this particular project you discussed or received communications from Leonti, the resident engineer; is that correct?

A. If Leonti wanted gates closed, he would tell us to close them or ask us to close them. If there was no problems involved, offhand they would just go ahead and close them. [74] Otherwise we regulated the gates without any communications from

(Testimony of Albert M. Capps.)

Leonti or anyone else if the stream flow changed or we had to spill some more water out there.

Q. Assume that you are confronted with a situation where closures would be requested by Mr. Larson or Mr. Leonti, and, in your opinion, it might affect the production of power. Would you then call a conference concerning that closure that had been requested?

A. If it was critical or difficult to obtain, we would call a conference.

Mr. Fraser: I have no further questions, your Honor.

Redirect Examination

Q. (By Mr. Carney): Actually, at the time of the accident at 2:00 o'clock on August 20, 1954, how much water was being spilled in terms of feet per second through the spillway dam?

A. Well, let's see. (Witness consults exhibit.)

Q. I wonder if he could see the calculation.

Mr. Fraser: I think he has already testified to those figures.

The Witness: 45,550 cubic feet per second.

Q. (By Mr. Carney): At that time I believe you have previously testified that there was approximately 133,000 being spilled through the powerhouse? [75]

A. That is right.

Q. And that the flow was 191,000 feet. What was happening to the rest of the water? In other words, if you had the forty-five to the one hundred thirty-one, it comes out to be about 178,000.

(Testimony of Albert M. Capps.)

The Court: He has already testified that some of it went into the fish gate and the balance was being ponded.

Q. (By Mr. Carney): Will you state if an additional gate was closed, for example, Gate 8, what effect would that have had on the turbulence in the spilling basin, the tailrace, with all of the water then spilling out of just Gate 2 to 7?

A. If 2 to 7 were open to compensate for the closure of 8, it would increase the turbulence on the south half of the dam.

Q. Why is that? A. Well,—

Q. Would you like to use the blackboard?

The Court: I think that is quite obvious, but that was not the original question. Suppose that they had closed Gate 8 without compensating for it from Gates 1 to 7; inclusive. What would that have done besides raising the water?

A. It probably would not have affected the turbulence in the tail water one way or the other. It might have decreased it a little bit. [76]

The Court: It might have decreased it around No. 8?

The Witness: It might have decreased it around Gate 8, but it may have increased the eddy a little bit because you are creating an eddy of larger diameter if you move your gate spillage over to the north shore.

The Court: In your view, then, it might have cut down the turbulence immediately adjacent to Gate No. 8?

(Testimony of Albert M. Capps.)

The Witness: It would reduce the turbulence at Gate No. 8.

The Court: Would it increase the flow of water in Gates No. 1 to 7 by the closure of Gate No. 8?

The Witness: No, sir.

Mr. Carney: I have no further questions.

Mr. Fraser: No questions.

Mr. Hess: No further questions.

The Court: Did you discuss with Mr. Larson any time after the 13th the desirability of closing Gates 1 to 8 during the time that he intended to work?

The Witness: I can't remember whether that is a fact or not. I know that was our understanding from some conference which we had. I can't remember whether it was with Mr. Larson or who it was with. I know the question sometime must have been asked if we could close the dam off entirely.

The Court: Were you asked about the feasibility of this mission that they were undertaking?

The Witness: No, sir. [77]

The Court: Did you give them any information about its feasibility?

The Witness: No, sir.

The Court: Did you know that they were going to do it on the afternoon of August 20th?

The Witness: No, sir.

The Court: Were there alternative methods by which they could have accomplished the same purpose?

The Witness: I do not feel that I am qualified

(Testimony of Albert M. Capps.)

to answer that question. I am not a construction man.

The Court: Neither Mr. Larson nor anyone else discussed with you the feasibility of the plan nor the intention of the company to conduct the operations that were conducted on the 20th of August?

The Witness: No, sir.

The Court: As far as you know, Mr. Leonti was not consulted either?

The Witness: Well, I couldn't say about that.

The Court: Is he here, Mr. Leonti?

Mr. Carney: His deposition is here, and I believe his deposition will show that he was told that they were going to go out here, and he was the one—I think the stipulation further shows that the contractor's employe asked Mr. Leonti to close two additional gates, which were closed. [78]

The Court: Any further questions?

Mr. Fraser: No further questions.

The Court: That is all.

Mr. Carney: That is all of the testimony.

The Court: Where are the depositions?

Mr. Carney: The depositions are here. I would say that the depositions of Mr. Leonti and Mr. Goebel are in evidence, but the deposition of Mr. Capps which happens to be in the same book is just here for impeachment purposes.

(Thereupon, after discussion between Court and counsel, the hearing was concluded.) [79]

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Cause.]

DEFENDANT'S EXHIBIT No. 8

DEPOSITION OF PATRICK J. LEONTI

Patrick J. Leonti, a witness produced in behalf of Plaintiffs, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

Q. (By Mr. Hazard): Mr. Leonti, at the end of the deposition you have the privilege of awaiting its transcription and reading it before signing it, or you can waive your signature, and waive the reading of the deposition. It is customary to waive it, but it is your privilege to await its transcription. I will ask you now whether you wish to waive it or not.

A. I desire to waive it.

Q. Would you state your name, please?

A. Patrick J. Leonti.

Q. What is your age, Mr. Leonti? A. 43.

Q. What is your occupation?

A. Construction engineer for the Corps of Engineers.

Q. To what District of the Corps of Engineers, if any, are you particularly assigned?

A. Portland, Oregon, District.

Q. How long have you been in the employ of the United States? A. Oh, about 18 years.

Q. How long have you been employed in this District?

A. From the middle of 1949. That makes it roughly six and a half years. [4]

(Deposition of Patrick J. Leonti.)

Q. What is the nature of your duties that you customarily perform for the United States?

A. Well, at present and at the time that we are concerned with, why, my job was to work on construction contracts to see that the interest of the Government was lived up to.

Q. What was your title at the time on the Larson contract?

A. I was the Construction Project Engineer at Bonneville.

Q. Your official title was Project Engineer, is that correct?

A. Yes, Project Engineer. It was (Construction) in that there is Construction and Operations Project Engineer, too.

Q. Is this similar in nature to the task that you perform? A. Pardon?

Q. Is this the same sort of thing you have done for the Government elsewhere in this District?

A. Yes.

Q. Before and after?

A. What I am doing now, too.

Q. What kind of projects had you customarily worked on? A. On dam construction.

Q. How long have you been in dam construction?

A. Well, I have worked for the Corps of Engineers totally for the 18 years and essentially there in dam construction.

Q. During that time virtually all of your work has been in dam construction? [5] A. Yes.

(Deposition of Patrick J. Leonti.)

Q. Can you describe the general nature of the project? Are you aware that there was a contract between Robert Larson, doing business as Larson Construction Company, and the United States?

A. Yes, I was.

Q. Could you state the general nature—wasn't that contract relative to the repair of Bonneville Dam?

A. Yes, it was the repair of the baffle deck and restoration of the baffles, I think, is the full detail of that particular contract.

Q. When was that contract entered into?

A. Oh, you want the official—

Q. Roughly. A. Awarding date?

Q. Roughly.

A. Well, I think in June or July of 1954.

Q. What was the general nature of the intended project? A. I do not—

Q. Can you describe what was supposed to be done by the contractor in carrying out the contract?

A. He was to erect and construct the cofferdam and seal off, let us say, a portion of the baffle deck at Bonneville and then dewater the area and then repair the baffle deck and the baffles. [6]

Q. Can you describe first what is meant by the baffle deck?

A. Well, just immediately downstream of the spillway of the dam—I guess everybody is familiar with a dam spillway—there is an area with these concrete, oh, let us call them the obstructions, deliberate obstructions that we put in to cut down

(Deposition of Patrick J. Leonti.)

the velocity of the flow of the water over the spillway, and our job was to repair the deck that those baffles were on and the baffles themselves.

Q. Is this sort of, like an apron below, a concrete apron extending below the dam?

A. Immediately below the spillway is the baffle deck, and then immediately below the baffle deck is the so-called apron.

Q. What was the occasion for undertaking to repair it? Did you have knowledge of defects or breaks in the baffle deck?

A. Just based on previous studies made by the Corps of Engineers.

Q. What did those studies reveal? What was the problem?

A. Well, that the flow of the water over Bonneville Dam through the years had eroded the concrete on the baffle deck and the baffles themselves.

Q. Was there a pitting or something of that sort?

A. Yes, pitting, eroding, breaking them up; therefore, they were not working at their fullest efficiency. [7]

Q. How much of the dam was to be repaired in this project?

A. In this particular contract, you mean?

Q. Yes, sir.

A. For the south half of the spillway.

Q. That would be the Oregon side?

A. The Oregon side.

(Deposition of Patrick J. Leonti.)

Q. I will hand you Plaintiffs' Exhibit No. 1 which I will ask the Reporter to mark.

(Blueprint of site map marked Plaintiffs' Deposition Exhibit No. 1 for identification.)

Q. (By Mr. Hazard): I am handing you Plaintiffs' Exhibit No. 1 which is a blueprint map entitled "Sheet 1 to 12," and it is coded M-2-61/1. Am I correctly designating the technical number of this map? A. Yes.

Q. This appears to be a small scale map of the Bonneville Dam, the powerhouse and spillway dam, and it has certain marks on it to indicate a project to be conducted on the Oregon side of the spillway dam; is that correct? A. Yes, it is.

Q. And first, in reference to this on the Oregon side of the spillway dam on the downstream side, according to the map are indicated a series of circles parallel to the dam. Could you tell us what those are? [8]

A. Those are steel sheet piling, cellular cofferdam; well, the entire thing makes a cofferdam. These are individual cells connected together forming the cofferdam which, in turn, seals off this particular area in which the work is to be conducted.

Q. I see seven large circles going parallel to the dam and three small circles coming in an are more or less vertically—or at right angles to the face of the dam. Each of those is a cylindrical section of the cofferdam; is that correct?

A. That is right. They are individual cells forming the entire cofferdam.

(Deposition of Patrick J. Leonti.)

Q. Is there some sort of a seal between each of the cells; is that correct?

A. There is what we call the connector, this little arc on one side, arc on the other side made up of the same material, steel sheet piling, connecting the individual cells together and forming, as I say, the entire cofferdam.

Q. When you mention those little arcs you are talking about those small, some 15-degree arcs between the circles; is that correct?

A. That is right; those are the connectors.

Q. At the northern or Washington end of the cofferdam I see a grid which on the map is rectangular as viewed from above. Could you tell us what that is?

A. That is—we call it the timber crib which effected the [9] closure for the cofferdam on that north side, as you say. The steel sheeting piling cellular cofferdam was connected or joined to the timber crib, and that effected the seal for the particular area in which your work was to be done.

Q. Do I understand that the crib was to butt against the face of the dam; is that correct?

A. That is right, and rest on the so-called ogee curve of the spillway section of the dam itself.

Q. Could you explain for us what you mean by ogee curve?

A. Well, I designate it with my hand, but it is the one cross-section area of the spillway itself. I mean this thing is not rectangular or square. I guess you people have seen dams. The spillway sec-

(Deposition of Patrick J. Leonti.)

tion of the dam itself is formed in a curve to make the least resistance for the passage of water over the spillway.

Q. Does ogee refer to the cross-sectional—

A. No, it is the type of curve. It is named for the type of curve.

Q. The ogee describes the kind of cross-section we have here; is that correct?

A. That is right.

Q. Below or downstream from a cross-hatched area is a small cylindrical section of the cofferdam. Is it correct that at that point your cofferdam commences and that those rest on a more or less flat section of the spillway? [10]

A. The individual cells of the cofferdam, these two here that are indicated.

Q. You are referring to the two small ones that—one which comes immediately off the timber cribbing and the second one is the one next following that going downstream?

A. Yes, designated in the design, let us say, of the cofferdam, cells No. 1 and 2.

Q. Could you mark those on the map, please? Would you mark a little "1" next to the cell you are talking of as 1 and 2. Are they numbered consecutively thereafter; is that correct?

A. Yes.

Q. Could you just number three so that we can see.

(Witness writes on exhibit.)

(Deposition of Patrick J. Leonti.)

Q. And thereafter they run right down; is that right? A. 4, 5, 6, 7, 8, 9 and 10.

Q. Now you were speaking of Cells No. 1 and 2, how they rest on the—what sort of a foundation did they rest on?

A. They rested on the concrete baffle deck, this area designated by this dotted lined downstream.

Q. The first dotted line down from the dam?

A. Down from the dam and into the ogee of the spillway is the location of the baffle deck, and Cells 1 and 2, except for the small downstream portion of Cell No. 2, rested on the baffle deck itself.

Q. Cell No. 3 rested on the apron; is that correct? [11]

A. On the apron, and so did all the other cells.

Q. So that the apron is the area between the first dotted line downstream from the dam and the second dotted line downstream from the dam; is that correct? A. Yes.

Q. Is it correct that at the point where Cell No. 1 is located the ogee is fairly flattened, relatively flattened?

A. Well, approximately at the upstream end of Cell No. 1, let us say, the ogee curve starts.

Q. Upward toward the dam?

A. Upward toward the upper end of the ogee end of the spillway.

Q. So that Cells No. 1 and 2 and 3 rest on comparatively flat surfaces; is that correct?

A. And so do Cells 4 through 10; all the cells do.

Q. Yes, as distinguished from the timber crib?

(Deposition of Patrick J. Leonti.)

A. That is correct.

Q. Could you explain the purpose of having separate—having cells and crib? For example, why didn't they have cells go all the way up to the face of the dam?

A. Oh, that is not technically nor economically feasible, to run the cellular cofferdam up on a steep grade.

Q. It would be structually difficult to work it out?

A. That is right, in that we are dealing with concrete foundation, let us say, and not being able to obtain any [12] penetration; that is, driving them into some softer material.

Q. That is, they simply rest on the surface; is that it?

A. That is right. Why, you would not be able to set steel piling, as I say, on a relatively steep—

Q. It would skid or something of that sort?

A. That is right.

Q. Can you describe the manner of construction of the timber crib? What is that like? Can you describe its appearance and what it does?

A. Well, it was built of good-sized timbers, let us say, and more or less in latticework, if you know what I mean. It was built log-cabin style.

Q. That is, you are moving from the bottom to the top, building in log-cabin style?

A. Either way, either longitudinally or laterally as you built in that fashion, and, then, as I say, the intent was to set that on the curved portion of

(Deposition of Patrick J. Leonti.)

the spillway, and then it was sheathed on the inside with vertical sheathing and then filled with sand and gravel.

Q. The bottom of the crib, what was the shape of that?

A. That more or less was to conform to the cross-sectional—cross-section of the spillway itself.

Q. So that the curve of the bottom of the timber crib should have an ogee in the same way that the dam face itself is an ogee? [13]

A. Yes, to a certain extent. I mean, it would be hard to build a latticework timber crib to conform exactly to the ogee curve of the spillway.

Q. But within the limitations presented by the fact that you were using square timbers at the bottom, that was the purpose, and were they cut off at different lengths so that you would have a curve there?

A. That is right; they were cut off at different lengths, and they were, oh, mitered or beveled to effect a more perfect fit to the spillway.

Q. Is the crib at the point where it touches the dam, is its edge vertical or is it—is it a continuous curve from the upstream top of the crib to the downstream bottom, or is the curve only along the bottom side of the crib, if you follow me?

A. No, not quite. The entire bottom side of the crib is resting on this, as I say, so-called spillway, bucket.

Q. I will hand you Plaintiffs' Exhibit No. 2 which I will ask the Reporter to mark.

(Deposition of Patrick J. Leonti.)

(Blueprint map of timber crib and details, M-2-61/3, marked Plaintiffs' Deposition Exhibit No. 2 for Identification.)

Mr. Hazard: This appears to be a blueprint map numbered Sheet 3 of 12, M-2-61/3. This appears to be the detail of the crib section. How would you describe this part of the map, Mr. Leonti? [14]

A. It is a longitudinal section through the crib. When I say "longitudinal," longitudinal the way we are facing, upstream to downstream or vice versa.

Q. Is this drawing substantially the shape in which the crib was to be placed?

A. That is correct.

Q. According to this diagram, there was really no upstream vertical edge of the crib. It was one continuous curve?

A. Just a small—you are speaking of the bottom?

Q. Yes, except for that small, I guess, blocking at the end; is that correct?

A. Well, if we designate the distance from here, from this extreme downstream point to this extreme upstream point, this as the bottom, and then we can discuss from there what you are talking about. You mentioned vertical, and I am thinking of this little particular vertical portion running up here (indicating on exhibit).

Q. That appears to be just a few feet long; is that correct?

A. That is correct.

Q. Now, I see on the extreme right of the draw-

(Deposition of Patrick J. Leonti.)

ing "Spillway Crest Elevation 24.0." What does that mean with respect to the dam?

A. That is the elevation of the topmost point on the spillway, and that figure 24 designates its elevation above a certain [15] datum which I think is taken usually around here as meaning was level.

Q. At that point the ogee of the spillway crosses the line marked "Axis of Dam"? A. Yes.

Q. Is that point the point at which the gate hits the foundation of the dam?

A. I don't believe so. I think it would be well to wait for other witnesses who know more about the exact location of the gates with respect to the axis of the dam.

Q. You do not have any knowledge, looking at this diagram, where the timber crib, where the bottom of the gate orifices is located?

A. Not in detail. It would be just a guess on my part to say that they are located upstream or downstream of that dam axis.

Q. Mr. Leonti, do you know when notice was given to—or approximately when notice was given to Larson to commence construction of the project?

Mr. Carney: Are you asking if he knows of his own knowledge?

Mr. Hazard: Yes.

Mr. Carney: Do you know of your own knowledge?

The Witness: No, not at the present moment; I will say I do not. [16]

Q. (By Mr. Hazard): Do you know when he,

(Deposition of Patrick J. Leonti.)

in fact, first came out with his preliminary crews to the dam?

A. Not the exact date. It would be a bare guess on my part now as to when he exactly came out.

Q. Do you know when you came out?

A. Yes, I started at the project itself on the 16th of August, 1954.

Q. Was Larson already there? A. Yes.

Q. Who did he have with him at that time?

A. Whom did he have with him?

Q. Yes, did he have a full crew, or did he have merely preliminary crews?

A. No, at the time I came, why, his crew was fairly substantial in that he was, let us say, doing preliminary work in conditioning of the piling in an area that we designated as the welding yard.

Q. That was on dry land? A. Yes.

Q. He was preparing some of the materials for future use in the building of cells?

A. That is right.

Q. Do you recall what day of the week the 16th was? A. Yes, it was Monday.

Q. Monday? A. Yes. [17]

Q. Did you have a discussion with him at that time about the order of procedure in building his cofferdam?

A. No. You mean when I first arrived on the job?

Q. Yes.

A. No, I arrived on the job and then let my presence be known and met Mr. Larson at the time and his key men.

(Deposition of Patrick J. Leonti.)

Q. Who were they?

A. Mr. Harry Claterbos, Jr., was his, I guess we would call it, acting superintendent at that time.

Q. Were there any other key men?

A. Let's see; there was a pile buck foreman or superintendent. I forget his correct designation, a Mr. Davenport, and I met Mr. Larson's timekeeper and some of the, well, some of the other pile buck foremen. I was going to say I would guess that Mr. Davenport was their pile buck superintendent and that he had other foremen working under him, and I met several of those.

Q. What was the nature of your discussions?

A. Well, you mean on the specific day or in general?

Q. Well, you arrived on the project on Monday. Let us back up for a minute. Are you aware that the occurrence which is involved in this litigation happened on the 20th of August?

A. That is correct.

Q. Is that a matter of your own knowledge?

A. Yes. [18]

Q. Do you recall what day of the week that was? A. That was a Friday.

Q. What sort of discussions did you have with Mr. Larson between Monday and Friday about the conduct of the work?

Mr. Carney: I will object to the form of the question. I think it should be more specific. You are asking the witness to state what he did over a whole week.

(Deposition of Patrick J. Leonti.)

Q. (By Mr. Hazard): Did you have any discussions during that week with respect to the order in which Mr. Larson would conduct his activities?

A. Oh, I probably did. I mean we had numerous discussions in the course of the week, naturally, on the different phases of the work and spoke of the conditions of the specifications that were going to have to be lived up to and the completion time on the various phases of the work.

Q. Did you discuss with him the building of the timber crib?

A. I don't know whether we did at that particular time. Subsequent to that, of course, we had any number of discussions on the fabrication of the timber crib.

Q. Did he discuss with you the procedure by which he measured the ogee of the stream?

A. Mr. Claterbos was the one that I had a prior discussion with.

Q. What was the nature of that discussion?

A. Well, on the—now, this was in the middle of the week [19] on Wednesday. That would be the 18th of August, and he requested a closure of certain of the spillway gates so that he could go in with a barge towed with a tugboat that they had at the time to attempt to determine the conditions of the spillway at the particular bay that the timber crib was to set in, and that was to occasion the closure of additional spillway gates, particularly in the area that the timber crib was to set.

Q. Do you have any recollection of approxi-

(Deposition of Patrick J. Leonti.)

mately the number of gates that were opened before he made the request?

A. I believe that the number that were closed before he made the request were seven gates that had been closed.

Q. Seven were closed at the time?

A. That is right.

Q. How many gates are there, Mr. Leonti?

A. There were 18 gates all told in Bonneville.

Q. Does that include the fishway gates?

A. Yes, I believe it does.

Q. Let me back up a minute. Do I understand that the fishway gates are at the extreme ends of the dam, one on the Oregon side and one on the Washington side?

A. That is correct; yes.

Q. And in between there are, then, 16 gates?

A. I do believe that is the correct number.

Q. According to your best recollection?

A. Yes. [20]

Q. Are those gates numbered?

A. Yes, they are numbered.

Q. How are they numbered?

A. Starting No. 1 on the Washington shore and then proceeding in a southerly direction to the Oregon side.

Q. Is the fishway gate on the Washington side No. 1?

A. I think it is. I do believe we could check the plans or—again let me say that there are other witnesses that are more familiar with the number of the—

(Deposition of Patrick J. Leonti.)

Mr. Hazard: Off the record.

(Discussion off the record.)

Mr. Hazard: We will go back on the record.

It is stipulated that there are 18 bays of which the one, the fishway gate on the Washington side, is No. 1, and the fish bay on the Oregon side is No. 18.

Mr. Carney: They are numbered consecutively.

Mr. Staring: So stipulated.

Mr. Carney: So stipulated.

Mr. Hazard: Off the record.

(Discussion off the record.)

Mr. Hazard: It is stipulated that the bay into which it was intended to put the timber crib was numbered Bay 9.

Q. It is your recollection that the bays, except for the fishway bays, that seven were at the time before Mr. Claterbos made his request, seven were open; is that correct? [21]

A. No, seven were closed.

Q. You say that seven were closed and that nine—

A. It is my recollection at this time that seven on the south end of the spillway were closed.

Q. Seven on the south end of the spillway, not seven altogether. I am just trying—we have 16 bays. Off the record.

(Discussion off the record.)

Mr. Hazard: It is stipulated that on Wednesday, August 18th, at the time you had the discussion with Mr. Claterbos that Bays 11 through 17

(Deposition of Patrick J. Leonti.)

were closed; that 18 may have been open a little bit.

Mr. Carney: Approximately eight inches.

Mr. Staring: Is that right, Mr. Leonti?

The Witness: That is correct. I am basing this on the premise that my discussion with—

Mr. Carney: What was the question that you asked?

Mr. Hazard: I had asked him how many were closed, and he said seven, but I had thought that seven meant seven of the 16, but it is your recollection that that was seven of those on the Oregon half?

The Witness: That again now does not include the fishway bays, these No. 1 and No. 18.

Q. Well, we will disregard the fishway bays.

A. We are concerned now with the 16, let us say, in the center of the spillway? [22]

Q. Yes.

A. It is my recollection that seven were closed, and I am thinking of the seven nearer to the Oregon side.

Q. Do you have any recollection as to the open or closed status of the ones on the Washington side?

A. I do not have, no, personally.

Q. Do you recall whether all of them were open?

A. All 18 gates, you mean?

Q. No, all on the Washington side were open?

A. At what time?

Mr. Carney: I am going to object at this point to the use of this term of "Washington side" be-

(Deposition of Patrick J. Leonti.)

cause I think that it would be more accurate to talk about bay number.

Mr. Hazard: All right; we will go back to our numbers.

(Discussion off the record.)

Mr. Hazard: I have marked on Plaintiffs' Exhibit No. 1 in pencil Nos. 1 through 18 in the base of the spillway dam. I believe it is stipulated that that is the correct number designation of these bays?

Mr. Carney: So stipulated.

Q. (By Mr. Hazard): You said you did not know the numbering system of these bays, Mr. Leonti?

A. I wasn't sure that the fishway bays were included in this numbering, but I do now recollect that that is the case, only I didn't want to go on record as stating positively that [23] No. 1 was the north fishway bay.

Q. What I am getting at at this time a week prior to the accident did you think of the bays as the Washington side and the Oregon side?

A. No, we thought of them as north and south.

Q. North and south. Did you then know the numbers of the bays?

A. Yes, I had a—at the time that I was on the job, first arrived on the job, I was—

Q. Did you know that the crib was to go into what was designated as Bay 9? A. Yes.

Q. Now, when we speak of the north side do you mean the 17 bays excluding the fishway bay on the

(Deposition of Patrick J. Leonti.)

north side, starting with 8, and running northwardly 8, 7, 6, and so on? A. As being open?

Q. No, as being Washington or north side. Where was your axis north and south in your frame of reference?

A. Well, I could be referring to a north bay and be thinking in terms of Bay No. 15, for instance. I would not have a demarcation line somewhere in the center of the spillway and make everything south of that south and everything north of that north.

Q. You did not have a particular axis?

A. Just the relative position of one bay to another. [24]

Q. Well, relative to Bay No. 9, do you have any recollection as to how many bays were open north of No. 9? A. North of No. 9?

Q. On Wednesday.

A. On Wednesday? No, the exact number I do not have a recollection of. There were bays open because the dam was spilling water. How many were open and how many closed on each day I would not have any way—

Q. Do you have any recollection, of your own recollection, that some were closed?

A. On Wednesday I can't remember any were closed. There may have been some closed during a portion of the particular day and opened subsequently or before, let us say, my time of discussion with Mr. Claterbos.

(Deposition of Patrick J. Leonti.)

Q. Do you have any recollection whether Bay 9 itself was open or closed that day?

A. Whether it was open or closed on Wednesday, no, I don't have any recollection.

Q. What did Mr. Claterbos—did he explain to you he wanted bays closed?

A. Yes, he wanted to proceed into Bay 9, as I previously stated, with a barge and to sound off the sides of the barge on the ogee section of the spillway in that particular barge to try to determine more accurately the actual existing condition [25] of the ogee in Bay No. 9.

Q. You say "more accurately." More accurately than what, Mr. Leonti?

A. Our plans showed the condition, the original condition of the ogee section.

Q. As it was built in 1933 or '4?

A. That is right; and he wanted to try to find out whether conditions had materially changed from what was indicated, let us say, in the drawings.

Q. Was he under the impression that there might have been a change, a material change?

Mr. Carney: I object to the form of the question. How would he know what—

Q. (By Mr. Hazard): Did he indicate to you that he was under the impression—

Mr. Carney: Pardon me; who are you talking about, Mr. Larson or Mr. Claterbos?

Mr. Hazard: Mr. Claterbos, the man he said he talked to.

(Deposition of Patrick J. Leonti.)

Q. Did Mr. Claterbos indicate to you that he thought there might be a material change?

A. Yes, it appeared to them, and when I say "them," the contractor, that the possibility existed that there was, that there could be a material change in the condition of the spillway.

Q. Had you formed any impression on that subject yourself? [26]

A. None whatsoever; no, sir.

Q. Did you think there was such a possibility?

A. Well, let me say this, that we were under contract to correct or repair dams, and it was possible that conditions of the spillway itself as well as the particular work that we were going to repair could have been changed from what it was originally.

Q. Was there any available data one way or the other, to your knowledge?

A. As to the condition of the——

Q. As to whether there had been a material change from the original?

A. No, we had no record of any material change in the condition of the spillway itself.

Q. You say yourself that you did not know whether there had been such a change?

A. No, I didn't.

Q. Did you discuss in detail with Mr. Claterbos the manner in which he would make the measurements?

A. He explained to me, as I have stated already, that they would attempt to bring a barge into Bay

(Deposition of Patrick J. Leonti.)

No. 9 and to sound with a leaded weight off the sides of the barge and attempt to determine the, let us say, the actual condition of the location of the concrete surface in that particular bay.

Q. Did you say that he had asked you to have some of the [27] gates closed; is that correct?

A. Yes.

Q. Just what did he ask you to do?

A. Well, after explaining what he planned on doing, he asked that the gates in Bays 10 and 9 be closed for a definite period on the following Friday so that they could perform the operation that they had in mind.

Q. Did he designate them by number?

A. Well, I started to say earlier that my recollection of Gates 11 through 17 as being those that were closed was premised on the fact that he made a request, definite request to close Gates 10 and 9, which were open, so as to effect the complete closure of the gates on the south portion of the spillway.

Q. Did he ask you, did he refer to them by number? A. Yes.

Q. Did he mention Spillway 8? A. No.

Q. Do you know whether Spillway 8 was open at that time?

A. Well, on Friday, now, or Wednesday?

Q. No, on Wednesday.

A. I can't recall whether it was open or closed on Wednesday.

(Deposition of Patrick J. Leonti.)

Q. Do you have any idea what time of the day this discussion was?

A. Oh, no, not exactly. I would say that it was sometime [28] in the morning of the 18th.

Q. Would you say the first thing in the morning or mid-morning?

A. Well, I would again guess mid-morning.

Q. According to your best recollection, it was mid-morning? A. Yes.

Q. Is that, do you understand that as 10:00 a.m., roughly?

A. That is right; I am thinking roughly of times between 8:00 a.m. and noon.

Q. So that sometime, according to your best recollection, sometime around 10:00 a.m., give or take a half-hour, is your best recollection as to when this conversation took place? A. Yes.

Q. Was anyone else present at that conversation?

A. I don't believe so, and I might add this, that preliminary to the actual discussion that we had face to face he first called me on the phone, let us say, perhaps to tell me that he was coming over to discuss this particular feature.

Q. Did he add anything over the telephone than that he was coming over? A. No.

Q. And to state the purpose—you had no detailed discussion over the telephone?

A. No, the actual details were given when we were face to face. [29]

Q. What happened after this discussion?

(Deposition of Patrick J. Leonti.)

A. Well, I then had to contact others to effect the closure of these two gates, we will say, first to see if it were possible to do so and then to actually effect them at the particular time that it was planned to perform that particular operation.

Q. Who were the others that you had to contact?

A. Well, as I mentioned quite previously here, I was the Project Engineer on Construction for the particular work under the contract, but the dam, the operations of the dam come under the Project Engineer for Operations who is permanently located Bonneville Dam.

Q. What is his name?

A. Mr. Capps, Albert Capps, and it would be, or was my duty, to contact his office to make the necessary plans, let us say, for effecting the closure of the two additional gates.

Q. On Wednesday did you call Mr. Capps?

A. Yes; not Mr. Capps. I mentioned that I called—had to do business through his office. I talked actually initially to a Mr. Leuhring.

Q. How do you spell that?

A. L-e-u-h-r-i-n-g.

Q. You spoke to Mr. Leuhring?

A. That is right.

Q. What did you tell him? [30]

A. Well, I first explained to him what the contractor wanted to do and also explained to him that, explained to him and informed him, let us say, to perform the operation that would be neces-

(Deposition of Patrick J. Leonti.)

sary to get an okeh to shut down gates as I mentioned, 9 and, 10 so as to effect closure of all the gates on the south half—or south portion of the spillway, again with the exception of Fishway Bay 18.

Q. Did he then indicate to whom he would have to go to get approval?

A. No; he indicated, of course, that he would have to get his approval from higher authority and that whenever that came through, why, then, he would inform me as to whether the permission was granted or not.

Q. Did he subsequently call you? A. Yes.

Q. What did he say?

A. Well, that it was going to be all right to effect the closure of the gates in Bays 9 and 10 at the particular time that it was planned to perform the operation.

Q. What was the particular time, what time?

A. It was planned to effect the closure of the gates, of Gates 9 and 10 along with those that had been previously closed, for the afternoon of Friday, the 20th.

Q. I thought we were talking of Wednesday?

A. Pardon? [31]

Q. I am sorry, I thought we were talking about Wednesday, this day that you had the discussion with Mr. Claterbos.

A. It was planned to perform the survey operation on Friday.

(Deposition of Patrick J. Leonti.)

Q. The discussion Wednesday was with respect to a plan to be carried out Friday?

A. That is correct.

Q. What time do you recall you called Mr. Leuhring after that discussion? A. Pardon?

Q. After your discussion with Mr. Claterbos, what time do you recall that you called Mr. Leuhring?

A. I do believe it was, well, let's say almost immediately after Mr. Claterbos left my office.

Q. Sometime in the morning of the 18th?

A. Yes.

Q. What time did Mr. Leuhring call you back?

A. Not until the following day did we get the okeh.

Q. Do you recall what time that was?

A. Of the following day?

Q. Yes. A. No, I do not.

Q. Morning or afternoon?

A. It would be just a pure guess on my part to say that it was either morning or afternoon.

Q. You have no recollection. Did you have any other [32] discussion with Mr. Claterbos after the 18th with respect to closing those gates?

A. Well, I had discussion with him, of course, after I got the okeh from Mr. Leuhring. I in turn passed that on to Mr. Claterbos.

Q. You told him that—exactly what did you tell him?

A. Well, I told him that the operations office of the project would close the gates 9 and 10 in

(Deposition of Patrick J. Leonti.)

addition to the—I mean, keeping the gates that were already closed closed for the period that he requested the closure to be done.

Q. Did you have any other discussion with him about closing the gates in this interval between the 18th and the accident?

A. No, I don't believe so except perhaps that he may have checked with me on the morning of the 20th, more or less of a reminder, let us say, to make sure that the gates would be closed for the afternoon of Friday, the 20th.

Q. Do you recall what time he planned to go out? Did he tell you what time he planned to go out?

A. Well, we were to effect the closure for the afternoon, as I say, of Friday, the 20th, immediately after lunch, which ran from 12:00 to 12:30.

Q. So that the closure was to be made at 12:30?

A. That is right, at 12:30, at which time they would proceed with their operation, and the closure was to be for a roughly four-hour period beginning at 12:30. [33]

Q. Were you at the project site on the morning of the 20th?

A. At the project site?

Q. Yes.

A. I was at Bonneville; yes, sir.

Q. Were you in the immediate vicinity of where Mr. Claterbos—well, by “project site” I will site the area on the Oregon side right next to the dam. Were you in that area?

A. I wasn't—no, I was in my office.

(Deposition of Patrick J. Leonti.)

Q. Where is your office?

A. In the downstream south control tower of the spillway at Bonneville.

Q. Can you see the face of the dam in there?

A. I can go into the toilet and see the top deck of the dam, and that is all that you might say is visible from the office.

Mr. Hazard: Off the record.

(Discussion off the record.)

Q. (By Mr. Hazard): Did you see Larson Construction Company preparing the tug and the barge for the trip?

A. No, that was done entirely away from this particular area that you mentioned. It was done upstream in the so-called forebay area of Bonneville Dam.

Q. What was the nature of that preparation, do you know?

Mr. Carney: I object. He just stated that he didn't see it. [34]

Q. (By Mr. Hazard): When did you first see the tug and barge on the morning of the 20th?

The Witness: On the morning of the 20th!

Q. Or did you first see—did you see the tug and barge on the morning of the 20th?

A. No, I did not.

Q. You did not know where they were at that time? A. Pardon?

Q. You did not know where they were at that time?

A. Not from my own personal visual observa-

(Deposition of Patrick J. Leonti.)

tions. I know that they were, not by hearsay but from others, that they were making their preparations upstream of the dam.

Q. When did you first see the tug and barge on this particular day?

A. I didn't see the tug or barge at all until after the occurrence of the accident. Actually, from then on I didn't see the tug at all until after it was brought to the surface.

Q. On the morning of the 20th you at no time saw either the tug or the barge?

A. No, I didn't.

Q. And at no time up until the accident?

A. No.

Q. Where were you that morning?

A. Most any number of places. I no doubt made a trip or two over to the welding yard. I may have gone over to the [35] Operations Project Engineer's office and possibly may have been down in Mr. Larson's office.

Q. Was there any—do you recall any discussion that morning of the proposed trip to the face of the dam of the tug and barge?

A. With any particular individual now?

Q. With anybody.

A. Well, as I stated earlier, that it may have been that Claterbos may have talked to me either personally or by phone to check to make sure that the closure of the particular gates in question would go through as planned.

Q. Did he tell you where the barge and tug

(Deposition of Patrick J. Leonti.)

were? A. You mean before?

Q. Did he describe to you what he was going—where the barge was and just what he planned to do that particular day?

A. You mean did he definitely locate to me the fact that the barge was in the forebay and would proceed around to the side in question?

Q. That is right.

A. Yes, I would say that he did say that they were making their preparations upstream, and then at a designated time would come down through the navigation locks at Bonneville and then proceed into the particular work area that they were going to perform the operation. [36]

Q. Did you have occasion to look at the face of the dam during that morning?

A. Oh, I guess I looked at the face of that dam every morning. That was where the particular work that we were going to perform was to be performed, and I would naturally be looking over the work site, you might say, practically every chance I had.

Q. Well, during the morning were you at numerous—some intervals in a position where you could see the face of the dam?

A. Well, yes, when I first came to work, why, I would have had occasion to have been in a position to observe the spillway dam itself.

Q. Were there other occasions during the morning?

A. Well, if I—I no doubt did not spend all my

(Deposition of Patrick J. Leonti.)

morning in my office, and, as I say, may have made trips to the welding yard, in which case I would have had to go outside to get into my car to travel to the welding yard, and then again been in a position to observe the spillway.

Mr. Hazard: Off the record.

(Discussion off the record.)

(Thereupon the noon recess was taken, adjourning to 1:30 P.M.) [37]

(The taking of the deposition herein was resumed, pursuant to recess, at 1:30 o'clock P.M.)

PATRICK J. LEONTI

the Deponent herein, thereupon was examined and testified further as follows:

Mr. Carney: We think the record ought to show that Mr. Wood is present, as he was this morning, and with Mr. Larson and Mr. Anderson.

Mr. Erskine Wood: We are making no appearance.

Mr. Hazard: Would the Reporter read the last two questions.

(Questions read.)

Direct Examination—(Continued)

Q. (By Mr. Hazard): Were there other occasions in the morning when you could see the dam, face of the dam?

A. There may have been, but I don't remember at this time.

Q. Do you have any recollection of the open or closed status of the bays on that morning?

(Deposition of Patrick J. Leonti.)

Mr. Carney: Pardon me. Which morning are you speaking of?

Mr. Hazard: Friday.

Q. Is that your understanding, that we are talking about Friday morning of August 20, 1954?

The Witness: Yes, to my knowledge, the gates, as I mentioned before, 11 through 17, were closed.

Q. Do you have any recollection as to the status of the other gates?

A. Not Gates 1 through 8. Definitely, 9 and 10 were open because those are the two gates that were requested by Mr. Claterbos to be closed.

Q. You have no special recollection as to 1 through 8?

A. No, not as a group.

Q. Do you have any recollection as to them individually?

A. No.

Q. But it is your recollection on the morning of Friday, the 20th, that 9 and 10 were open?

A. Yes.

Q. Do you know what time the tug and barge set out to reach the face of the dam?

A. From the forebay, no.

Q. Did you see them on the water approaching the dam?

A. No, I did not.

Q. You did not see them sink, either?

A. No.

Q. The first knowledge that you had that the trip was actually under way was after it had occurred and the craft had been sunk?

A. That is correct. [39].

Q. Do you have any knowledge whether or not

(Deposition of Patrick J. Leonti.)

Bays 9 and 10 were closed? A. You mean——

Q. At the time that the craft approached, or, that is, do you have any knowledge, did you receive any word at any time Friday morning or make any observations Friday morning noting that 9 and 10 had been closed?

A. The complete closure of Bays 9 and 10 was effected just prior to the planned operation. Sometime in the morning 9 and 10 were open, but just prior to the operation, as planned, 9 and 10 were closed by the Project Operations personnel.

Q. Do you have personal knowledge of that?

A. Yes.

Q. How did you determine that?

A. Well, I rechecked with Mr. Leuhring that gates in Bays 9 and 10 would be closed.

Q. You did that sometime during Friday morning? A. Yes.

Q. What did he inform you?

A. That they were closed down, the gates in Bays 9 and 10, as planned.

Q. Did you see them after they had been closed?

A. I didn't make a specific trip to do that, but sometime prior to the operation in one of my trips, why, I did see to it that the Bays 9 and 10 and the others were closed as [40] planned.

Q. You observed that they were closed?

A. Yes.

Q. Did you make any observation about Gate 8?

A. No, I didn't check further on from 8 up through 1 to make sure that each individual gate

(Deposition of Patrick J. Leonti.)

was closed, but I did make sure, ascertain that 9 through 17 were closed.

Q. Do you have any recollection whether 8 was closed at the time you made your observation with respect to 9 and 10?

A. No, I can't say as I remember making a particular definite point to check that the gate in Bay 8 was closed.

Q. Do you have any recollection, in fact, whether they were closed? A. No.

Q. I am sorry; we are talking about Gate 8. You have no recollection whether it was closed?

A. No.

Q. You think you observed that 9 and 10 were closed sometime the late morning of the 20th?

A. Yes, it was, oh, I went to lunch, regular lunchtime, 12:00 to 12:30, and prior to that I had made the observation that, well, that is as I say, I rechecked with Leuhring to make sure that the plan was going to go through and then observed that that was the case.

Q. After that observation you do not recall having looked [41] — do you recall having looked at the dam between then and before the accident?

A. No; no. I mentioned that I was at lunch 12:00 to 12:30. Do you mean between?

Q. Well, I mean sometime in the late morning before lunch. You say you observed that 9 and 10 were closed, and that you do not have any recollection about 8? A. That is right.

Q. After that observation, do you recall observ-

(Deposition of Patrick J. Leonti.)

ing the dam, this portion of the dam, before the accident occurred?

A. No, I do not recollect that I made a second check.

Q. Is it correct that your next information about this transaction was your learning that the tug and barge had sunk? A. That is correct.

Q. How did you discover that?

A. Actually, Mr. Larson informed me. We happened to be talking on the phone at the, let us say, the time of the accident, and he received the message verbally perhaps or somehow or other that a distress signal was being given perhaps that there was a man overboard, and he immediately hung up, and I believe so did I. It was actually, let us say, coincidental in the phone conversation with Mr. Larson that I knew of the accident.

Q. Did he tell you over the telephone that it had sunk? [42]

A. No, he mentioned that he had received a message that there was a man overboard.

Q. And then he hung up?

A. That is right.

Q. What did you do then?

A. Well, then, I hung up, of course, and went down from my office out onto the fishway approach deck to try to observe what was happening. In the length of time it took me to go from my office out to the deck it actually, you might say, was all over.

Q. What did you observe from the deck?

A. Pardon?

(Deposition of Patrick J. Leonti.)

Q. Did you observe the tug or the barge?

A. I did not see the tug at all. I did see the barge. The barge remained afloat for a few minutes, and then it broke up and the pieces went downstream.

Q. When you observed it where was it?

A. Exactly I don't recall. I didn't make an effort then to determine its exact position, but it was somewhere in the north half of the spillway.

Q. Well, let us establish the axis of observation. First, about how far away from the dam was it when you observed it?

A. It was right close to the dam itself.

Q. Five or ten feet?

A. Well, it would be pretty hard to determine. It may have [43] been in against one of the piers.

Q. Did it appear to be perhaps bumping into or in contact with one of the piers?

A. Yes.

Q. So it was right close to it, touched it?

A. Yes, it—

Q. Was there water spilling from one of the gates at that point?

A. Yes, it was spilling. As I say, it was somewhere in, let us say, the north half of the spillway.

Q. Was the open water between you and the barge?

A. Pardon?

Q. Was the open water between you and the barge?

A. Open water, I don't—

Q. I am talking about now the waterfall from the open gates. There was an open gate; is that correct?

(Deposition of Patrick J. Leonti.)

A. Yes, there were gates open, as I say, on the north half of the spillway. Those on the south half again, 9 through 17.

Q. 9 to 17 were closed? A. Were closed.

Q. Do you recall whether 8 was open?

A. No, I didn't, I didn't make an effort to check the exact number of gates that were open.

Q. You did not form——

A. I did know where, I did know where Gate 9 was and counted [44] 9 down through 17.

Q. Did you observe that 8 was open, that No. 8 was open?

A. Well, there were a number of gates on the north half that were open. The exact number I personally did not make an effort to check.

Q. Well, did you say that you observed that 9 through 17 were closed? A. That is correct.

Q. Did you observe the next one going north was open?

Mr. Carney: He just testified he didn't.

Mr. Hazard: Well, I want to see if by making the other observation——

The Witness: No, I didn't make an effort to check the position of every gate, 1 through 18. As I say, I did know where Gate 9 was, or Bay 9, counted from Bay 9 through 17. I did check that those were closed.

Q. Was there an open spillway between you and the barge when you observed it?

A. I don't recall the exact position of the barge, whether it was in front of Bay 8, 6, 3, 4, or what-

(Deposition of Patrick J. Leonti.)

ever it was, but there was open water in the immediate vicinity of the barge when I observed it.

Q. Did the water appear to be hitting the barge?

A. Well, the barge was moving in and out, let us say, at times, and water was hitting the barge, and at times the [45] barge was clear under the cascade of water.

Q. It was moving in and out under the cascade?
A. That is right.

Q. And it bounced around in that manner, you say, and then broke up; is that it?

A. Yes, it broke up, and the individual pieces eventually floated on downstream.

Q. Did you see any men on the barge?

A. No.

Q. Did you see any men in the water?

A. No.

Q. Did you have an opportunity to observe about how high the cascade of water was, that is, the difference in height between the place where the water was coming out and the place where it was hitting the water on the downstream side?

A. Well, I just don't quite get what you are asking.

Q. I will see if I can phrase it a little more meaningfully. There was a cascade of water coming from some gate or gates that you observed?

A. Yes.

Q. About how high, what was the vertical height of the cascade, how high was the waterfall?

A. Oh, I made no attempt to measure.

(Deposition of Patrick J. Leonti.)

Mr. Carney: How high with reference to what?

Mr. Hazard: Well, from the top of the moving waterfall [46] to the water level of the water in which it was spilling. Do you follow what I am getting at? Off the record.

(Discussion off the record.)

The Witness: I will say my answer would be the same. I made no attempt whatsoever to determine any height of waterfall, let us call it.

Q. Can you form any estimate?

A. Pardon?

Q. Can you form any estimate?

A. No, I would say let us say not. The distance between me and that was such that my estimate would be anywhere from a foot to 20 feet.

Q. Was it about 20 feet as opposed to about a foot?

A. No, I would say that there is no question but it was different elevations. It did range in the magnitude of one foot to 20 or perhaps 25.

Q. On previous days is it your recollection that the water level below the dam was about the same as on this day?

A. You mean what we call the elevation? You mean what we call the so-called elevation?

Q. The lower side of the waterfall with respect to the dam. I mean out to the base of the dam, the water below the dam.

A. From what datum?

Q. From the bottom of the spillway or the open—off the record. [47]

(Discussion off the record.)

(Deposition of Patrick J. Leonti.)

Mr. Hazard: Back on the record.

Q. As I understand it, the elevation of the tailrace is the water level below the dam. With respect to the elevation of the tailrace, was the elevation of the tailrace on the days, the four or five days that you were there before, and including the 20th, approximately the same?

A. Well, I don't recall now what the tailrace elevation was for any one day; but records were kept and are still being kept, for that matter, of these various elevations.

Q. I am asking you do you have any recollection as to whether there was any apparent change in the elevation of the tailrace?

A. No, I do not know now whether in that, let us say, five-days period, whether it had remained at a constant figure or whether it had changed from one day to another.

Q. You do not recall that it made any—do you recall that it did not make any substantial change? Do you have any opinion on it at all?

A. Well, I can say that I can recollect that it did not make any substantial change. It no doubt changed but not—

Q. It was reasonably uniform; is that your recollection, or relatively uniform?

A. Well, if you are comparing the 20-foot descent, why, it was; but if you are comparing 20 feet to 21, why, it was a [48] drastic change.

Q. Within those terms it was relatively uniform. Now, then, did you have any occasion to make an

(Deposition of Patrick J. Leonti.)

observation of the fall of water from an open gate to the tailrace, and can you give us any opinion, do you have any recollection as to the approximate drop?

A. No, that would not have been anything that I would have been concerned with or for that matter interested in, as to the height of the drop or anything like that.

Q. You have no recollection of that?

A. No.

Q. I believe you stated initially, Mr. Leonti, that you are an engineer. Are you a graduate engineer?

A. Yes, I am.

Q. In what sort of engineering?

A. Civil.

Q. You stated that you have been working largely on dams for the last eighteen years?

A. That is correct.

Q. May I ask from what college you graduated?

A. Northeastern University.

Q. Is that in Boston?

A. That is correct.

Q. In your eighteen years of working with dams have you ever undertaken or been a project engineer or associated with [49] the project engineer on a project similar to this one?

A. No.

Q. Have you knowledge of projects similar to this one?

A. No, I do not.

Q. Do you know of a project similar to this one ever being undertaken?

A. Before or since?

Q. Before—at the time.

A. No, I have no knowledge of such.

(Deposition of Patrick J. Leonti.)

Q. To your knowledge, this was the first project of this type? A. No, I won't say that.

Q. Explain if you wish.

A. Well, let me say this, that to my knowledge—well, now, I am getting all twisted up. Let us have your question again now.

Q. To your knowledge, is this the first project of this type, and by project I mean dewatering a dam in this manner for repair purposes—is this, to your knowledge, the first type?

Mr. Staring: Do you mean as far as he knows?

Mr. Hazard: Yes, I am asking as far as he knows.

Mr. Staring: As far as he knows is the question.

The Witness: Yes, as far as I know, why, it, again to my knowledge, is the first job of this type.

Q. (By Mr. Hazard): Have you ever read or studied about any other projects?

A. Have I what?

Q. Have you read accounts or studied about any other projects of this type?

A. No, I have not.

Q. In your previous experience had you ever encountered problems of dewatering below a dam?

A. No.

Q. Had you ever encountered projects involving the repair of a dam? A. No.

Q. Was your previous experience confined to original construction of dams?

A. That is correct.

(Deposition of Patrick J. Leonti.)

Q. In those original construction projects did you ever run into a situation where there was a falling body of water in the construction area?

A. Well, yes. I mean, all dams are constructed on bodies of water with water falling. Now you are saying that in a similar job. I wasn't in any similar type job.

Q. I see, sir; but I am asking now, you said there had not been any similar types of jobs to your knowledge. Now, have there been similar problems; that is, the problem of falling water in the vicinity of the work in other jobs that you have [51] encountered?

A. Well, I don't know what you mean now again by falling waters. As I started to say, we are involved in water in construction of any dam. There is always a water problem to be considered.

Q. Well, I am talking about it because I do not know anything about building a dam; but when you build a dam on projects that you have been engaged before have you ever had a situation where work had to be done next to falling water?

Mr. Staring: There is no testimony here that any work had to be done next to falling water.

Mr. Hazard: Well, that may be—or where work was done next to falling water.

The Witness: Well, I did mention that I have been on the original dam construction, it being no occasion for there being any falling water present. Falling water is made after a dam is in existence.

Q. (By Mr. Hazard): So that you had never

(Deposition of Patrick J. Leonti.)

run into this particular situation before, a situation similar to this where falling water—

A. Of working in an existing dam where water is cascading out of the spillway, no, I mentioned that I hadn't.

Q. You mentioned earlier that Gates 11 through 17 were closed on both Wednesday and Friday of the week of which we [52] are speaking; is that your recollection?

A. No, I don't think I mentioned that I absolutely knew that Gates 11 through 17 were closed on Wednesday. I did mention that they were closed on Friday.

Q. Were they closed on Wednesday?

A. I don't remember.

Q. You don't recall. Do you have any recollection of Gates 11 through 17 being closed simultaneously and being kept closed?

A. 11 through 17?

Q. Yes.

A. No, I personally do not have any recollection of when Gates 11 through 17 were closed.

Q. Did you have any discussion with any of the employees of the Larson Construction Company with respect to the closing of Gates 11 through 17?

A. No.

Q. Do you know how it was that those gates were closed on Friday, August 20th?

A. 11 through 17?

Q. Yes.

A. They were not made to close or put on seal,

(Deposition of Patrick J. Leonti.)

as the expression goes, on the 20th. They had been closed previously; just when I don't remember. The records are kept at the dam whenever any operations of that nature are performed. [53]

Q. Does "put on seal" mean anything different than closing? Does it mean permanent closing?

A. No, it means closing.

Q. You had no knowledge of how it was that 11 through 17 were closed. You say that on the 18th you do not recall their being all closed. On the 20th you do recall that they were all closed. Now, is it your testimony that you don't recall how it was that they came all to be closed? That is, did you transmit any requests, for example, from the Larson Construction Company that those be all closed?

A. You say now did I get a request from them? Their request was that Gates 9 and 10 be closed to effect a complete closure from 9 through 17. Now, as to when Gates 11 through 17 themselves were closed, I have no recollection, but records kept at the dam would show when they were closed.

Q. Do you have any recollection as to their open or closed—11 through 17—open or closed status before the 20th; any recollection at all?

A. Well, I am remembering that some of them were closed. Just how many were closed and how many were open and at what time I have no recollection.

Q. Did you have any discussion with Larson

(Deposition of Patrick J. Leonti.)

Construction Company about closing those Gates 11 through 17?

A. Well, as I mentioned before, the request was that we close Gates 9 and 10. [54]

Q. Yes, I understand.

A. So as to make the complete closure from 17 up through 9.

Q. Was there any discussion about 11 through 17? A. No, not specifically for those gates.

Q. Did you understand that those gates were to be closed, 11 through 17?

A. I understood that when we closed or had Gates 9 and 10 closed then we would have a complete closure from 9, as I say, through 17.

Q. Did I understand that you understood that 9 and 10 would be specifically closed, but sometime before or immediately thereafter 11 through 17 would also be closed; is that correct?

A. Either would be closed or had been closed. As I say, as to when the Gates 11 through 17 were actually closed I do not recollect.

Q. Did you have any conversation with Mr. Tobias with respect to this project going out to the dam? A. Yes, I did.

Q. What was that discussion?

A. Well, on the morning of the 20th, was when I had my discussion with him, and then he, you might say, repeated in substance just what the operation was that he was going to perform, repeated the operation similar to what Claterbos had previously [55] represented to me.

(Deposition of Patrick J. Leonti.)

Q. That is, he told you that they intended to move the tug and barge out into Bay 9 and make measurements on the ogee? A. That is right.

Q. Was anyone else present at that conversation?

A. I do not remember that there was.

Q. Do you recall any discussion then about Gate No. 8? A. No, I do not.

Q. Do you recall whether that discussion was held at a place from which you could observe Gate No. 8?

A. That was held in my office, and from my office, why, I had no direct line of viewing the job site.

Q. Was that conversation before you conversed—with Mr. Claterbos—was that conversation before you conversed with Mr. Leuhring?

A. I don't recall whether it was before or after.

Q. Was it before you checked late in the morning about—

A. It was before recheck just before lunch to see that the Gates 9 and 10 would be closed.

Q. You recall no discussion about Gate No. 8?

A. No.

Q. Did you have any knowledge or impression as to the open or closed status of Gate 8 at the time of that conversation? A. No, I didn't.

Q. Did Mr. Tobias seem to have—did he appear to have any [56] impression about the open or closed status of Gate No. 8?

A. That wasn't in the discussion at all.

(Deposition of Patrick J. Leonti.)

Q. Did you have any assistants or superiors on the project? A. Pardon?

Q. Did you have any subordinates or superiors on the project site?

A. I had subordinates.

Q. Who were they?

A. Or a subordinate at that time.

Q. Who was he? A. Otto Miller.

Q. Miller? A. Miller.

Q. Was he present at any of these conversations? A. No.

Q. Do you know whether he knew of the proposal to go out into Bay 9?

A. I don't recall that I ever talked with him about it.

Q. You do not know whether or not he was aware of that? A. No.

Q. In your discussion with Mr. Claterbos or Mr. Tobias were you informed of the manner in which it was proposed to rig the barge and tug?

A. To rig it, you say?

Q. That is, how they were to be tied to one another? [57] A. No.

Q. Did he describe to you in any particulars how they were going to push out into Bay 9?

A. No, the actual navigational problems were not discussed. It was just what was to transpire when they did get into Bay 9.

Q. Did he indicate to you that he would push the barge into Bay 9?

A. No; there was, as I say, no discussion made

(Deposition of Patrick J. Leonti.)

as to the preliminaries in getting the barge into 9 but what was to take place once the barge was in Bay 9.

Q. Did he discuss with you the manner in which he proposed to anchor in Bay 9? A. No.

Q. Did he use simply the phrase, "We will make fast to it"; something like that?

A. Not to my recollection.

Q. At the time of your conversation or conversations with Mr. Leuhring did Mr. Leuhring make any comment about the proposal to go out—first let me say did you inform Mr. Leuhring of the plan to send a barge out into Bay 9?

A. No, I *am* informed Mr. Leuhring initially that the request was in to have Bays 9 and 10 closed for the purpose of sounding and determining the condition of the spillway in that particular bay.

Q. Did you mention to him that, in a general way, the manner in which sounding was to be conducted?

A. Well, only to the extent that I told him it was to be done from a barge to be sent in.

Q. Did Mr. Leuhring make any comment about Gate No. 8? A. No.

Q. Did you make any comment to him about Gate 8? A. No, I didn't.

Q. There was no discussion between you except, as you said, in two or three conversations that you had with Mr. Leuhring, is that correct, as to just what was intended, what Larson intended to do out there? A. No.

(Deposition of Patrick J. Leonti.)

Q. It was a very brief conversation?

A. My conversation with him essentially was that the request was in to effect a closure of Bays 9 and 10 at the prescribed time.

Q. And that they were going to take this barge out there to go into Bay 9; is that correct?

A. That is correct.

Q. Did you at that time have any knowledge of the navigational rules with respect to the dam and the craft in the vicinity of the dam?

A. Navigational rules, do you say?

Q. Do you know whether or not there are navigational rules [59] relevant to bringing craft in the vicinity when the downstream is high?

A. You mean generally speaking or for them to perform that contract?

Q. Generally speaking.

A. No, I don't know that.

Q. You do not know whether or not there are regulations? A. No, I do not.

Q. Were there any particular regulations with respect to this particular contract?

A. Regulations, no.

Q. Or rules of some kind?

A. No, it should have been understood by all that we would have floating equipment to perform the work involved.

Q. But you know of no rules or understandings as to the manner in which that was to be conducted? A. No.

Q. Mr. Leonti, were you able to form any opin-

(Deposition of Patrick J. Leonti.)

ion as to the quantity of water which came through a gate which was open, let us say, open a small way?

Mr. Carney: I object to that. I do not think the question is sufficiently specific.

Q. (By Mr. Hazard): Of the gates that you observed to be open during this week, are you able to form, or were you able to form any opinion as to the quantity of water coming through? [60]

A. Through any one open gate?

Q. Yes. A. None whatsoever.

Q. Do you have any engineering knowledge for estimating a quantity of water that comes through a gate?

A. It is so variable there is no concrete rule for water coming out through a gate. There are so many variables in it that there is no one specific, let us say, rule-of-thumb method of determining.

Q. You formed no opinion as to the quantity of water? A. No.

Q. As to the velocity of the water?

A. Pardon?

Q. As to the velocity of the water, had you formed any opinion as to the relative turbulence of the water in the immediate vicinity of the place in the tailrace where water from an open gate hits the tailrace gate?

A. The amount of turbulence?

Q. Yes.

A. Well, again measured from what datum?

Q. Well, I don't know; I am not an engineer,

(Deposition of Patrick J. Leonti.)

but I suppose that you have turbulences in—is that something one can discuss? Are there engineering datum by which you measure turbulence?

A. There are no specific units for the measurement of [61] turbulence.

Q. How do you engineers discuss turbulence, then, in terms of intensity?

A. Well, just using laymen's terms, that it is mild, severe, or moderate.

Q. Then using laymen's terms, do you have any opinion as to the turbulence of the water at the place where it was hitting the spillway and where the spillway water was hitting the tailrace water at this particular time? Would you describe it as severe, mild?

A. Well, now, at what time are we specifically talking about?

Q. On the 20th.

A. On the 20th, the morning?

Q. You said you observed several gates open on the afternoon of the 20th when you—

A. Do you mean turbulence immediately in front of the open gate?

Q. Yes.

A. Or perhaps turbulence, if any, in a location where the gates are not spilling?

Q. Let us take, first, immediately in front of an open gate.

A. Immediately in front of an open gate. My first question is how many dogs is the gate open?

Q. Well, let us assume it is open one dog. [62]

(Deposition of Patrick J. Leonti.)

A. One dog, why, I would say that the turbulence is moderate.

Q. How about five dogs? A. Severe.

Q. How about three? A. Oh, severe.

Q. How about two dogs—somewhere between moderate and severe, I take it?

A. Well, as I mentioned, there are so many variables which will vary the turbulence in front of a gate when it is at two dogs.

Q. How about the turbulence of the water at one dog and the water in the bay adjacent to a bay which is open?

A. Well, I have not made any specific observations.

Q. Have you made sufficient observation to form any opinion?

A. No, no. I—as I say, I wasn't concerned with the amount of spillage and the turbulence. I personally did not make any observations as to what the severity of it was.

Q. You say that Mr. Miller was your subordinate; is that correct? A. That is correct.

Q. Did you have any other subordinates?

A. At that time no.

Q. Or assistants to Mr. Miller? Was he the "bottom man on the rung," so to speak? [63]

A. At that time there was just the two of us.

Q. In the five days or four and a half days before this event did you say you had some conversations with Mr. Larson? A. Yes.

Q. And members of his company?

(Deposition of Patrick J. Leonti.)

A. That is correct.

Q. Did Mr. Larson indicate that he had experience in dam work?

A. Well, he would not have had occasion at that time to inform me of his experiences in that type of work.

Q. In your short conversations with him prior to the 20th did you form any opinion as to his experience, of him and his men, in working on dam work?

A. No; as I say, I first got to know Mr. Larson on that particular job. I did not know him prior to it, and I would not have had time in the four, four and a half days, to form opinions as to his qualifications or experience in similar type of work.

Q. Did he make any statements to you about this being the first kind of job of this kind that he had ever done? A. No.

Q. Could you amplify a little bit on what your duties on this project were, Mr. Leonti?

A. Well, essentially, to see to it that the contractor performed the job as required by the specifications. [64]

Q. As to quality, time, and so forth?

A. In that he met the qualitative specifications and within a time allotted for the job.

Q. Was it your job to relay to your superior—who was your superior at that time?

A. My superior, well, I worked under the Construction Division in the Portland District Office, chief of which is Mr. John Kemple.

(Deposition of Patrick J. Leonti.)

Q. He was your immediate superior?

A. Pardon?

Q. He was your immediate superior?

A. He was the Chief of the Construction Division. I received instructions and orders from him and others among his staff.

Q. You said that Mr. Claterbos asked you to see that Gates 9 and 10 were closed; is that correct?

A. That is correct.

Q. Was there any reason why Mr. Claterbos would not make that request direct to Mr. Leuh-ring?

A. Yes, there was reason. I was the duly assigned Construction Project Engineer, and any activities that were going on on the job or any changes in the operations provisions of the dam would have to come through me.

Q. You were the liaison man, one might say, between the company and the various personnel relating—

A. In the operations end of it.

Q. To your knowledge was the Larson Construction Company [65] instructed that they should deal through you when it was necessary to communicate with the Operations Division?

A. Yes, they were always aware of that.

Q. That was your understanding?

A. Yes.

Q. During the week of the 16th through the 20th we have discussed that you had conversations with Mr. Claterbos and with Mr. Tobias about closing the gates, and specifically in reference to Gates

(Deposition of Patrick J. Leonti.)

9 and 10, did you have conversation with any of the members of the Larson Construction Company relating to the closing of gates?

A. No. To my recollection, that matter was taken up with me by Mr. Claterbos, and the discussion with Mr. Tobias concerned only the actual operation of the survey in Bay 9.

Q. Do you recall any conversations with any other member besides these two individuals; any other member?

A. No, I do not.

Q. Any other member of the Larson Company; not with Mr. Larson?

A. I don't remember having conversation with him specifically for closing Bays 9 and 10.

Q. Do you remember having any conversation with him relative to the problem of closing gates generally?

A. Closing gates generally?

Q. Yes; not with particular reference to 9 and 10. [66]

A. Well, we had a number of discussions on that score.

Q. Would you tell us what those discussions were about?

A. Essentially that, closing the gates.

Q. Well, what was said? Who broached the subject?

Mr. Carney: What time are we talking about now?

Mr. Hazard: From the time Mr. Leonti came to the job until the actual disaster involved here.

Q. How did the topic come up?

(Deposition of Patrick J. Leonti.)

A. Just in general conversation, as I say, to the effect that gates would be closed or would have to be closed at various stages of the job.

Q. You talked it over with him and concluded—you both agreed that the gates would have to be closed from time to time; is that correct?

A. Well, yes, that—Mr. Leuhring understood that since we were working below a spillway dam that we would have to have gates closed before we could perform the work.

Q. You say it was understood. How did you so understand it?

A. Well, we were going to erect a cofferdam, and we were going to effect closure of an area in which to do work, and one of the spills, let us say, of the cofferdam was going to be the spillway itself, so, naturally, the gates would have to be closed to effect that a hundred per cent.

Q. Well, would that be for any other purpose than dewatering [67] it to make the work possible? Is that correct; is that what your understanding was?

A. Well, yes, to be in a position to be able to erect different cells of the cofferdam we would naturally have to have gates closed. It would have been humanly impossible to work.

Q. Because of the turbulence thrown up by the spillway?

A. Because of the flow of water right in the immediate work area.

(Deposition of Patrick J. Leonti.)

Q. Was the immediate problem one of getting the water out of the cofferdam enclosure?

A. I am referring now to the time for installation of the cofferdam, erection of the cofferdam.

Q. Was it your opinion, in view of the engineering problems, that they would have to have two gates closed at the points where they were working in order to be able to get the cells erected?

A. That is correct.

Q. And the timber cribbing erected?

A. That is correct.

Q. Are the reasons for that opinion that the flow of the water, the turbulence and pressure of the water, would kick the cells about or the timber cribbing about and make it impossible to line them up properly?

A. That is right. [68]

Q. How heavy was this timber cribbing, Mr. Leonti, the wooden structure itself?

A. You mean how much did it weigh totally?

Q. Yes.

A. I don't recall that I personally determined what it did weigh.

Q. Did you form an opinion?

A. No. Well, did I form an opinion then, or would I know?

Q. Did you then? A. No.

Q. Have you formed an opinion in any way of a rough estimate to arrive at your conclusion that it would be difficult to put it in place if the spillway were not closed?

A. You mean because due to its weight?

(Deposition of Patrick J. Leonti.)

Q. Was the weight of the thing a factor in your considering the difficulty of getting a place where your spillway—

A. No, it could have been anywhere from a tenth of a block to something the size of this building. If one gate were open, it would never have been placed.

Mr. Carney: Are we talking about all the gates or one, or the gate opposite or what?

The Witness: Mr. Hazard mentioned working in front of the open gate.

Mr. Carney: You are now talking about the open gate immediately opposite where the work is?

Mr. Hazard: Well, let it stand at that.

Q. How about the gate next to it? How about the gate next to the bay where you are going to put in a crib?

A. You mean the difficulty involved in actually setting the crib in the bay with water in the next bay?

Q. Yes.

A. I never formed an opinion as to whether that would be feasible or not.

Q. In addition to the specific request by Mr. Claterbos for Gates 9 and 10, were any other specific requests made prior to the accident with respect to closing gates?

A. By whom is that? Mr. Claterbos?

Q. Any member of the Larson Construction Company.

A. Any specific request?

Q. Yes.

A. No.

(Deposition of Patrick J. Leonti.)

Q. The only gates that were specifically requested to be closed during this time were the 9 and 10 by Mr. Claterbos? A. That is correct.

Q. Were there any requests by any member of the Larson Construction Company to close all the gates except, let us say, 1 through 6—1 through 5 on the Washington side? Was there ever a general request to close all of them except the ones on the extreme north side?

A. You are referring now again to this time?

Q. Yes.

A. It would be—the day of the accident or just prior to it?

Q. During that first work. A. No.

Q. Did you discuss with Mr. Larson or any member of his company the readiness, the willingness of the Government to close gates—did you have any discussion about the difficulty of getting gates closed in this week?

A. No, I did not discuss anything like that because I myself would not have known of the difficulty. All our discussions consisted of was that his request to me would have to be put to the Operations office and that the granting of the request would have to come through the Operations office.

Q. You had no opportunity to observe whether or not those requests would be readily granted except your experience with 9 and 10?

A. No, at that time I would not have been able to form an opinion as to how rapidly any request that we put in would have been met by the Opera-

(Deposition of Patrick J. Leonti.)

tions office, but I knew that the request would have to go from me to them to effect the closure of the gates.

Q. Did you form any opinion as to the—off the record.

(Discussion off the record.)

Q. (By Mr. Hazard): Were you able to form any opinion at [71] that time about the danger of taking a barge in the manner proposed by Mr. Claterbos into Gate 9, Bay 9?

A. You say was I able to form an opinion?

Q. Did you form an opinion on it?

A. No, I did not.

Q. Did you form any opinion whether or not there would be any suction activity tending to draw the barge sideways if there were an open spillway next to where—

A. That is essentially the same question. My answer is still No, I did not form an opinion.

Q. Did you consider the problems?

A. Pardon?

Q. Did you consider the problems?

A. No.

Q. Have you considered the problems since then? A. Pardon?

Q. Have you considered the problems since then?

A. Considered the problem since then?

Q. Yes, have you considered the effect on a boat of the size of this barge passing into a bay next to an open spillway? Is it your opinion as an

(Deposition of Patrick J. Leonti.)

Q. engineer there would be any suction activity, any sideways activity?

A. I have not made studies along those lines, if that is what you mean?

Q. Have you formed any opinion? [72]

A. Pardon?

Q. Have you formed any opinion? Have you formed any opinion on its effect?

A. No, I have not.

Mr. Hazard: Off the record.

(Discussion off the record.)

Q. (By Mr. Hazard): Mr. Leonti, so far we have discussed events up to August 20th. In the procedures which you followed subsequent to August 20th was there any difference in the way you—in the way the gates were handled?

A. Any difference?

Q. Yes. A. Well, with respect to what?

Q. With respect to keeping them open or closed?

A. There were conferences at which that was brought up as a topic of discussion.

Q. What conferences, between whom?

A. Pardon?

Mr. Carney: I think I am going to object to this line of questioning on the ground that subsequent action is not admissible evidence as to what standard of care there might have been.

Mr. Hess: You are not instructing the witness not to answer the question?

Mr. Carney: I am interposing the objection.

Mr. Hess: This is a discovery deposition, also.

(Deposition of Patrick J. Leonti.)

Mr. Hazard: Relevancy is not an objection.

Q. Who was present at these conferences?

A. Members of the Corps of Engineers and members of the contractor.

Q. What steps were taken as a result of those conferences, if any?

A. I can't recall now what the specific steps were that were taken except that, as I say, further gate closure was one of the topics of discussion amongst other topics of discussion in the nature of the business of this particular contract.

Q. Was there a conference called specifically for the purpose of considering safety problems presented by this disaster? A. Pardon?

Q. Was there any conference or discussion concerning, principally concerning the safety problems presented by this sinking?

A. A safety conference?

Q. The safety problems presented by the barge sinking? Now, did you have any conference thereafter with a view to avoid future sinkings?

A. Well, with the, let us say, United States Government and specifically the Corps of Engineers whenever there is an accident, why, there is always an inquiry, a board of inquiry [74] that looks into the accident?

Q. Do they make recommendations?

A. Pardon?

Q. Do they make recommendations for future conduct? A. Yes, they do.

(Deposition of Patrick J. Leonti.)

Q. Did they make any recommendations in this particular instance?

A. Yes, recommendations are made by any board of inquiry.

Q. What were their recommendations?

A. Well, let's see——

Mr. Carney: I am going to object to that on the ground that you are asking this man to state what some other board's conclusions are when he does not have their conclusions and recommendations in front of him.

Q. (By Mr. Hazard): I say, do you recall any of the recommendations that were made?

Mr. Carney: Well, I think we are going to object to having him testify in that regard because the information you are eliciting would not be admissible in the trial because it is an admission of other parties, and, secondly, I do not believe it is available to you.

Mr. Staring: You cannot even get it by discovery by the proper methods.

Q. (By Mr. Hazard): Do you recall who was present at this investigation? [75]

A. Pardon?

Q. Do you recall who was present at this investigation?

A. Well, various members of the Corps and members of the contracting firm.

Q. Do you recall any of their names?

A. Well, again I have got to ask if that is

(Deposition of Patrick J. Leonti.)

considered part of the information that I am requested.

Mr. Carney: I think you can give the names of anybody present if you remember who was present, their names.

The Witness: I probably don't remember them all offhand.

Q. (By Mr. Hazard): Give us such names as you are able to.

A. Well, there is Mr. Neil Chitwood who is District Safety Engineer; Mr. Mark Clayton. These are now working for the Corps of Engineers. Mr. Ray Sandwick.

Q. Those three are the members of the board, is that correct?

A. Yes. Mr. Melvin Webster, and there is myself, of course.

Mr. Carney: You may as you go down tell who each one is. Who is Melvin Webster?

The Witness: Well, Mr. Clayton, Mr. Sandwick—is that his name, Ray Sandwick—Mr. Webster is one of the members of the board. Mr. Chitwood sits in ex officio, I guess you would say.

Mr. Carney: What is his title?

The Witness: He is Portland District Safety Engineer. [76] I don't recall whether Mr. Capps was there or not. Mr. Goebel was there. He is working in the Operations of Bonneville Dam. Mr. Harold Leach who was Chief of Security at Bonneville Dam. Well, let's see now. Mr. Robert Larson was there, the contractor; Harry Claterbos;

(Deposition of Patrick J. Leonti.)

Mr. Davenport, I don't remember his initials. Those are all that I remember. There could have been others, of course, but that is all that I remember.

Q. (By Mr. Hazard): Was there any change in the system of operations with respect to opening and closing the gates after the accident?

A. Any change in the system of operating the gates?

Q. Of making requests to close—relaying requests to close and closing, to your knowledge?

A. Any changes made in the procedure of the requests?

Q. Yes.

A. No, they still were handled in the same way.

Q. Was there any change in the number of gates that were closed?

A. Change in the number of gates?

Q. Yes.

A. Well, there was a change in the number of gates all through the job. Your river discharge varied the number of gates open and closed there.

Q. Were 11 through 17 kept closed at all times when there were personnel in the water area below the dam? [77]

A. Gates 11 through 17?

Q. Yes.

A. Yes.

Q. How about Gate 10?

A. Eventually 10 was kept closed.

Q. You say "eventually." It was not immediately afterward?

A. No, I can't say specifically or state specifically when 10 was kept, let us say, permanently

(Deposition of Patrick J. Leonti.)

closed through the life of the contract, but, eventually, the flow decreased such that all gates within the confines of the work area were closed.

Q. What is the work area that you are speaking of now?

A. Well, from Bay 9 down through Bay 17.

Q. That did not include Bay 8?

A. No, the limits of the work, if you will notice, is from Bay 9 where the timber crib sits, or did sit, south to Bay 17.

Q. Did they make a subsequent effort to measure the spillway ogee?

A. No.

Q. Did Larson Construction Company?

A. No, they did not.

Q. They simply built the crib according to their estimate without a sounding?

A. It was built according to the specifications.

Q. Do you recall the time when they sunk the—towed the crib out and sunk it?

A. Do I recall; no, I wasn't there at the time. I had been transferred from this project to another project when that took place.

Q. Did you have any discussion before your transfer as to the manner in which it would be towed out and sunk?

A. No.

Q. Or whether or not when that was done they would close any particular gates?

A. No.

Q. Who was in charge at the time it was sunk; do you know? Who was the Project Engineer at the time it was sunk?

(Deposition of Patrick J. Leonti.)

A. That the timber cribbing was removed and disposed of?

Q. No, sunk, first when they put it in.

A. Oh, I would have to back up here a bit. When you say "sunk" you mean set in place to perform the work?

Q. • Yes. A. I was there.

Q. You were there? A. Yes, sir.

Q. I am sorry. I perhaps misled you. Do you recall what gates were open when that was done?

A. What gates were open?

Q. Or what gates were closed when that was done? [79]

A. All the gates within the confines of the work area were closed; would have had to be closed. As I say, that was the area in which you were going to perform the work.

Q. Was Gate 8 closed, then?

A. I don't recall.

Q. A couple of times, Mr. Leonti, you referred to the confines of the work area. Do I understand that to mean an area between Bay 9 and the Oregon shore?

A. Well, I am speaking now of the confines of the area in which our repair work was to be done.

Q. When you were using the words "work area" you mean repair work area?

A. Repair, the actual, the ultimate that we were looking for.

Mr. Hazard: Off the record.

(Discussion off the record.)

(Deposition of Patrick J. Leonti.)

Q. (By Mr. Hazard): My associate has a little difficulty because Cell No. 1 was supposed to be set right before Bay 9; is that right?

A. Cell No. 1?

Q. Yes.

A. Let me look at the picture. (Blueprint presented to the witness.)

This is Cell No. 1 (indicating).

Mr. Hazard: Off the record. [80]

(Discussion off the record.)

The Witness: Cell No. 1 is this first cell here immediately downstream of the timber crib.

Q. The timber crib is in Bay 9; is that correct?

A. That is correct.

Q. Well, then, when you speak of---

A. Cell No. 1 is just No. 1 in numerical sequence.

Q. Yes, I understand.

A. In manufacturing sequence, I would say.

Q. What we are trying to do now is to define what you mean by "work area." Do you mean the outside perimeter of the cofferdam to be erected?

A. No, I am referring to which the repair work was to be performed, which is the baffle deck and the baffles within the confines of this cofferdam.

Q. Well, then, it would be the inside perimeter of the cofferdam that we are talking about as the work area?

A. Yes, as the particular work area I am referring to now. Actually, work areas, we have had thousands of others.

(Deposition of Patrick J. Leonti.)

Q. That is what I am talking about.

A. Our ultimate goal was to repair baffles and the baffle deck here in this area (indicating).

Q. I see Cell No. 2 is almost in front of Gate 8; is that correct? It is off-center a little bit?

A. That is right. It is south of the center line of Bay 8. [81]

Q. Do you recall what gates were closed when you put in Cells 1 and 2? A. 1 and 2?

Q. Yes, considering them separately.

A. Well, remembering the sequence of operations, Gates 17 through 9 were closed, had to be closed, and how many other gates were closed I can't recall offhand. 8 would have had to have been closed. That I know. Whether 7, 6 and 5 and so on, I don't recall now just if any of those were closed, but, as I say before, there are records that will indicate the position of the gates at any time.

Mr. Hazard: That is all.

Cross Examination

Q. (By Mr. Mize): Mr. Leonti, are you familiar with, from your engineering experience and education, the turbulence of water and the effect of water falling on water and the distance it might pull in something? Are you familiar with that as an expert?

A. Within limits I am. That is a specialized field.

Q. I understand it is.

(Deposition of Patrick J. Leonti.)

A. That is a hydraulics engineer's problem. I am not a hydraulics engineer.

Q. I was just wondering if you consider yourself a specialist in that field? [82]

A. No, sir.

Q. Or know anything about it? A. No, sir.

Q. So far as the distance and weight of water pulling in an object at a certain distance, you would not be able to give us any expert testimony in that field, would you? A. No, sir.

Mr. Hazard: Would you be able to form any opinion on that?

The Witness: No, sir.

Mr. Mize: That is all.

Mr. Hess: I have no questions.

Cross Examination

Q. (By Mr. Carney): I will ask you, considering your function as Construction Engineer on this project, did you have any control or concern over the means and methods by which the contractors would perform the contract?

Mr. Hazard: I object to that as calling for a conclusion of the witness. He is not competent to answer. The contract speaks for itself as to what his functions and to what his duties were and the extent of control of the United States Government over the contract.

Mr. Carney: He has entered an objection, so you can now [83] answer the question.

The Witness: Well, our assignment, our func-

(Deposition of Patrick J. Leonti.)

tion is to see that whenever a private contractor enters into a contract with the Government that he performs the work and lives up to the specifications and the details of his contract.

Mr. Carney: We have no further questions.

Cross Examination—(Continued)

Q. (By Mr. Mize): One more question here along that line that you have been asking. I take it, Mr. Leonti, that you were kind of a watchdog for the Government on this job; isn't that what it amounts to? A. That is right.

Q. In other words, if there were any complaints from Mr. Larson, any misunderstandings, he would go to you? A. That is correct.

Q. And if the Government had any complaints or wanted to stop the work or continue the work or do anything of that kind, instructions or orders to Mr. Larson would come from you; is that correct? A. That is correct.

Q. Were you concerned at all as a representative of the Government on this job with the conduct of the men, the Larson crew, or how they did their work? [84]

A. You mean all the details as to how they performed their various functions?

Q. Supposing somebody was not doing the job right and you were on the job watching what this man was doing. Would you have any power to request that that man be discharged or be fired by Mr. Larson?

(Deposition of Patrick J. Leonti.)

A. I don't believe that my authority went to that extent.

Q. You don't believe it did. If you saw a man doing something on the job which you felt was not in accordance with the specifications, did you feel that you had authority to tell him to stop that work?

A. If something were being done in direct violation of the specifications, then I would have had the authority to see to it that it was done in the manner that would live up to our specifications.

Q. You do not know what time the barge and the tug took off from wherever it was tied up?

A. No, I do not.

Q. To do this work? A. No, I do not.

Q. Do you have any personal knowledge as to whether or not the Government had any property—

A. Any what?

Q. Any property on this barge or on this tug at the time that they were performing this work?

A. No; no, the Government would not have had any of its own property on either.

Q. Do you know whether it did or didn't?

A. Do I know whether it did or didn't?

Q. Yes, do you personally know whether it did or it did not have any property on it?

A. Well, any Government property that was assigned to the job was also, let us say, assigned to me, and I would have been the one to know whether any Government property had—

Q. Then you would have—any property that

(Deposition of Patrick J. Leonti.)

would have been on the barge, Government property on the barge or on the tug, it would have been there only through your knowledge?

A. That is correct.

Q. Do you know whether or not there were any Government personnel on the barge or on the tug at that time, beforehand before they took off?

A. Before they——

Q. Working around it.

A. No, I would not have known that.

Q. You would not have known that?

A. No.

Mr. Mize: That is all.

Mr. Carney: That is all.

(Deposition Concluded.) [86]

DEPOSITION OF GROVER G. GOEBEL

produced as a witness in behalf of Plaintiffs, having been first duly sworn by the Notary, was examined and testified as follows:

Mr. Carney: I want to advise that we are going to confine this deposition to matters which are material to the issues in the case or which, as the Rules provide, reasonably would refer to testimony of material evidence, to cut down the long exploration that has been going on in the other deposition.

Direct Examination

Q. (By Mr. Hazard): Would you state your name, please.

A. Grover G. Goebel.

Q. What is your status, Mr. Goebel?

A. I am foreman of the outside hydraulic operations at Bonneville Dam.

(Deposition of Grover G. Goebel.)

Q. Does that mean you are in charge of the gates? A. That is right.

Q. Do you recall the week of April 16th through 20th which we have been discussing in this deposition? A. I do.

Q. Do you have records which show the positions of the gates during that week?

A. I do. [87]

Mr. Hazard: Off the record.

(Discussion off the record.)

Mr. Hazard: On the record.

Q. Mr. Goebel, I will hand you a document, really two documents clipped together, called Plaintiffs' Deposition Exhibit No. 3 for Identification, which appears to be a photostatic copy of the gate log record, and we wish you would describe it.

A. Yes, this is a gate log record from the control room. These records here are my records from the main dam.

Q. Are the control records made up from your records?

A. They are made up by phone call immediately after the operation is completed. They give us the time.

Q. I see; so that you perform the operation of moving a particular gate? A. That is right.

Q. You call up the control room and tell them that you have done that? A. That is right.

Q. And you tell them how many dogs?

A. That is right.

Q. They tell you what time?

(Deposition of Grover G. Goebel.)

A. That is right.

Q. And you enter the time in your——

A. We log it; yes, sir.

Q. So that they should correspond in each instance? [88]

A. They should, yes.

Q. On the log in Line 3 it is indicated that at 11:45 A.M. Gate 10 was closed from one dog to ~~the~~ dogs. That is, does that mean that it was closed shut?

A. That is right.

Q. How wide is a dog?

A. That is a 50-foot gate, and that is open nine inches.

Q. Assume they are gates less than 50 feet..

A. That 60-foot gate was 18 inches on the first dog. We are talking about one dog now.

Q. How wide is Gate 9?

A. Gate 9 is open, well, roughly speaking, four foot eight inches, roughly speaking.

Q. What does that one dog on Gate 9——

A. Gate 9, the first dog would be 9 inches. The second dog would be plus 24 inches, roughly speaking, within a fraction of an inch.

Q. On Gate 10 the first dog is nine inches?

A. That is right.

Q. What is the second dog?

A. The second dog would be plus 24 inches, and thereafter every dog is 24 inches after the first dog.

Q. On all gates? A. On all gates.

Q. What is the first dog on Gate 8? [89]

A. The first dog on Gate 8 would be 9 inches.

Q. And thereafter 24? A. Thereafter 24.

(Deposition of Grover G. Goebel.)

Q. The inches you are referring to is the amount of opening between the bottom of the gate——

A. And the seal of the gate, yes; the bottom of the gate and the——

Q. The seal?

A. Top of the ogee seal; that is right.

Q. The record indicates 11:45 on Friday, August 20th, Gate 9 was closed from two dogs—no dogs—I am sorry; strike that. At 11:45 a.m. Gate 10 was closed from one dog to no dogs? A. Right.

Q. Do you recall the circumstances of that closure? A. Yes, sir.

Q. Will you tell us about that?

A. About 10:00 o'clock in the morning Mr. Holzgang, Chief of Powerhouse Operations, called me up and stated by 12:30 they wanted 9 and 10 on seal, and we complied with that order, and at 12:30, as the log shows, twelve was on seal. I went out myself and operated during the noon hour.

Q. I see that under this chart under Gate 8 Gate 8 was closed from two dogs to no dogs at 12:30. Do you recall why that was done, the circumstances under which that was [90] done?

A. Yes, sir; when I discovered at 2:00 o'clock after I heard a distress whistle and I came back from the dock one of my men called me out to Gantry 6, and I knew there was trouble because I heard the distress whistle blowing from the contractor's derrick and barge at Bay 17, so we ran out to see what it was. As soon as I saw what happened, why, I ordered my operator to go up in the

(Deposition of Grover G. Goebel.)

cab and start closing 8 and all gates as fast as he could and to notify Mr. Capps immediately, and we went right to work.

Q. So that it is your recollection that the closing of Gate 8 to no dogs was after the accident?

A. Yes, sir.

Q. Mr. Goebel, tell us the width of Bay 10?

A. About 50 feet, approximately.

Q. And 9?

A. 50 feet; they are all standard.

Q. And 8? A. All standard?

Q. All? A. Any gate will fit any slot.

Q. They are all approximately 50?

A. Approximately 50 feet; maybe 52.

Q. Is the hole that that gate closes the same width in every case? [91] A. Yes.

Q. And that hole is approximately 50 feet wide?

A. That is right.

Q. So that when a gate is open one dog there will be a slot of water coming out 50 feet wide and however many inches the first dog of that particular gate is raised? A. That is right.

Q. How do you determine the number of dogs—I see over on the right-hand column “Total Dogs.” Is that—

A. That indicates the total number of dogs open at the time, regardless of what gate. If you total the dogs throughout the openings, they should total the number in the right-hand column, total dogs.

Q. Is that number kept for the purpose of keep-

(Deposition of Grover G. Goebel.)

ing track of how much water you are letting through?

A. The control room handles that end of it. They know how many dogs and they determine how much water is being passed, how much they have to pass according to the load on the powerhouse, and we just keep the number of dogs so as we can keep a check with the control room.

Q. They tell you how many dogs to keep open; is that correct? A. Yes, sir.

Q. Do they tell you which gates to keep open?

A. Yes, sir. [92]

Q. So that every change in gates you make is pursuant to an order from the control room?

A. Yes, sir.

Q. Do you participate in the determination of which gate you will keep open in any particular instance?

A. Under normal operations, on account of the fish run, then we do work the gates so there is no operation down below, systematically try to keep them level below so there is no eddies—if that will answer your question.

Q. You have a pattern of gate-opening?

A. To a certain extent, yes, so that we try to keep eddies out of the tailrace so that the fish have a nice lead-in into the fish run.

Q. You so regulate the gates that are down so that you do not have a turbulence right under the fishways that would disturb the fish; is that it?

A. That is the object of it, yes. You see, if you

(Deposition of Grover G. Goebel.)

open up the wrong gates, why, you create eddies and stuff, so we try to keep it as level as possible.

Q. For that purpose you have a system of gates?

A. That is right.

Q. Were you following that system on August 20th?

A. August 20th; no, I couldn't follow that system because half of the dam was closed, approximately half.

Q. Do your records show at what time 11 through 17 were [93] closed?

A. Yes, sir.

Q. Prior to the 20th?

A. Yes, sir; all gates were on seal at 8:00 a.m. on August 13th. All gates were on seal from 11 to 17.

Q. Was there any change from that between the 13th—is that the date you gave me, sir?

A. Not on those gates; no, sir.

Q. Then 11 through 17 the gates then from 8:00 a.m. of the 13th through to the date of the accident?

A. Yes, sir.

Q. Can you give us the total dogs that were open at 12:01 a.m. on the 19th?

Mr. Carney: Just a minute.

Mr. Hazard: Off the record.

(Discussion off the record.)

Q. (By Mr. Hazard): Do you recall, Mr. Goebel, during this week whether the water level behind the dam was such that when you opened the dog of a particular gate that the dog would be utilized to

(Deposition of Grover G. Goebel.)

the full extent? Do you follow me—that you would not have any air space between the bottom of the gate when you opened it, the dog, and between the bottom of the gate and the water? That is, when you opened the gate you were getting the full use of the opening dog; is that correct?

A. Yes, that will hold true regardless of the elevation [94] of the lake, regardless of what the elevation of the lake is. The only thing, the pressure is a little higher on a higher lake, but about that time we were holding about 73.5, I presume.

Q. That refers to height of water behind the——

A. Behind the gate; yes, sir.

Q. Is 73.5 the water level well above the bottom of the gates; is that correct?

A. Yes, the elevation of the ogee, I believe, approximately plus 24, and the elevation of the lake is 73.58, along in there.

Q. Was that the approximate level during this week? A. Yes, sir.

Q. I believe you stated that after the gates were closed, you closed them during the lunch hour. I am talking now of Gates 9 and 10.

A. That is right.

Q. Then you went to lunch?

A. Yes, sir; I ate a little bit before, a little bit after. Then that was it.

Q. Were you at the dam when the disaster took place? A. No, sir.

Q. Did you see the tug and barge at any time before you left? A. No, sir.

(Deposition of Grover G. Goebel.)

Q. Did you see them in the lower area? [95]

A. No, sir.

Q. Before they took out?

A. No, sir; I paid no attention to it.

Q. You saw them at no time during the morning of the 20th?

A. No, sir. They had the derrick barge there and what other equipment I had no idea. I paid no attention to it.

Q. You say "derrick barge." Is that another barge, then?

A. Yes, that is a derrick barge. He brought that in on the 17th, tied it up to Pier 17.

Q. That is a separate barge than the one they brought out here?

A. That is a different barge, yes, than the one that sunk.

Q. Do you know whether any of your men observed the barge coming out?

A. Not to my knowledge.

Q. Do you know what man was on the gates after you left?

A. Well, Jack Rohrer was on the watch with me.

Q. He is one of your subordinates?

A. That is right.

Q. Where was he stationed, do you know?

A. All morning long—we jammed a gate that morning. Then we were greasing Gate, Bay 15. We jammed the gate in the upstream slot so we were busy and did not see below. The gates close up up-

(Deposition of Grover G. Goebel.)

stream. We put the gate in Bay 15, then lowered the gate in Bay 15 to start greasing it. [96]

Q. Did Mr. Rohrer tell you whether or not he had observed the barge coming out?

A. No, sir; he didn't.

Q. Were there any other men on the dam in your crew or otherwise, to your knowledge, at the time the barge came up?

A. Well, I had two men working with me. I was shorthanded that day, and I had Mr. Miller and Mr.——

Mr. Carney: Maybe I can give his name. His first name is spelled A-r-i-k, and his last name is G-o-l-a-s-h-e-f-f, and Elmer W. Miller was the second one.

Q. (By Mr. Hazard): Mr. Miller and Mr. Golasheff, are they members of your crew?

A. No, I borrowed them from another crew to help me groove the gate.

Q. Do you know whether they were up there after you left for the lunch hour at 12:30 or not?

A. No, they were greasing the wheels at the gate.

Q. At the time? A. At the time; yes.

Q. You don't know whether Mr. Rohrer was up there at the time or not? You think he was?

A. No, I presume he was up there, of course, with those men.

Q. They were working on Gate 15?

A. Bay 15.

Q. Bay 15? [97] A. That is right.

(Deposition of Grover G. Goebel.)

Q. Did either Golasheff or Miller tell you whether or not they observed the tug or barge coming up approaching the dam?

A. They never told me nothing, but it was from my observation they didn't know a thing about it until I called them off the job to come with me after I heard the distress whistle, so evidently they didn't know.

Q. From the position where they were working you couldn't see down below?

A. No, sir; not down below. There is a parapet wall.

Q. There is a parapet there? A. Yes.

Q. Did you have any instructions prior to the morning of the 20th with respect to closing any of the gates except Gates 11 through 17 for—that arose out of the operation of Larson's Construction Company? A. Except in 11 to 17, you say?

Q. Yes.

A. No, that is all the instructions I had was just 9 and 10 bay's by 12:30.

Q. In addition to the instruction that you had already carried out about 11 through 17?

A. Those orders were given to me by Mr. Capps on the 13th. They were not to be opened any more. They were out of service. In other words, we were then jamming the gates in the upstream [98] slot after that for the contractor's purpose.

Q. How long have you worked on the dam, Mr. Goebel? A. 1934, February 8th.

Q. From the very beginning?

(Deposition of Grover G. Goebel.)

A. Yes. I beg your pardon; for the Government, 1938. I was working for the contractor in 1934.

Q. Since 1938 have you been in charge of the gates there? A. No, sir.

Q. How long have you been in charge of the gates? A. About the last ten years.

Q. Based on your experience, in your opinion would there have been any reason why you could not have closed Gate 8 as a practical matter in the operation of the dam?

A. I have no idea. We get that information from the control room. They know the flow of the water. I have no idea.

Q. You make no judgment as to whether or not a gate could or should be open?

A. No, that is up to them. They know what the load is, what the river flow is. We have no way of recording that, only once every eight hours we read the staff gauge.

Q. Which is the height of the water?

A. That is in the forebay.

Q. Forebay means behind the dam, upstream side? A. That is right, upstream.

Q. In your experience have you had a situation where the [99] staff gauge is approximately in the height where you have had more than eight gates closed? A. Beg your pardon?

Q. Have you ever had eight or more gates closed?

A. Oh, yes; we read the staff gauge even when we are on seal.

(Deposition of Grover G. Goebel.)

Q. Total seal?

A. Total seal, yes, the staff gauge, whatever the water is, the staff gauge.

Mr. Carney: I think he misunderstood your question. I would appreciate it if you would state the question. He may not have interpreted it right.

Mr. Hazard: All right.

Q. In your experience, in a situation when the staff gauge was in the vicinity of 73 have you ever known of a situation where you had more than eight gates closed?

A. I still don't get that question.

Mr. Carney: Perhaps the question is whether it would be possible to close the main seven or eight gates when you had an elevation of 73-some feet behind the dam. What would you do with the water?

The Witness: No, we can't, or it would flow over the top of the gates then. It all depends on how much power we are consuming, what the river flow is. That governs the situation. [100]

Q. (By Mr. Hazard): Is it your testimony that you could not close more than eight gates with the water at 73?

A. Could not close more than eight gates with the water at 73.

Q. You couldn't do it. You say you would have an overflow, then?

A. She overflows at 73. She slops over at 73.6.

Q. If you had that 73.6, in order to lower that

(Deposition of Grover G. Goebel.)

level, that would be determined by the number of dogs you would open up; is that correct?

A. If the water was 73.6 what?

Q. And you wanted to lower the water level, would you go about lowering it by determining the number of dogs?

A. That is right; if you lower the lake, you would have to pull dogs.

Q. Could you lower a given number of dogs for simply two gates and leave the other sixteen closed? Say you had to get twelve dogs open. Could you open twelve dogs on two gates and leave all of the other gates closed?

A. Yes, it could be done, but it isn't too successful because we get a terrible turbulence in the tailrace because you have got to have the gates as near level as you can to get away from turbulence.

Q. What is the problem created by this turbulence that you are talking about? [101]

A. If you open the gates, as you say, six dogs or twelve dogs on one end of the dam, why, you then would not be able to stand at the tailrace. It would just swing you around there and throw you out.

Q. How about if you had to use six gates?

A. That levels off better. That is why you notice we try to keep the gates level as we can.

Q. If you had to distribute—could you feasibly distribute 25 dogs among six gates if they were all at one end?

A. I wouldn't say possibly that you could be-

(Deposition of Grover G. Goebel.)

cause there would be too many dogs there. 25 dogs at six gates, that would be—say 30 dogs at six gates, that would be five dogs apiece. That would be too much water for that end. We would start washing out our bank. We have got to watch that.

Q. The downstream bank?

A. The downstream bank; yes, sir.

Q. How about 20 dogs, let us 18 dogs.

A. Same thing. It all depends. You have got to watch where you open, how you open. We try not to open up the end gates any more than during high-water periods even then because that would be maybe two, three, seven, sixteen—on account of the bank washing, and we just let enough water go through there to keep that, to keep the water from washing the bank out.

Q. Did the staff gauge indicate this was in high-water [102] period?

A. The upstream staff gauge is in operation the year around.

Q. I mean at this particular time was this a high-water period?

A. Yes; yes, we were spilling, but we had not shut down from the spring freshet yet.

Q. Mr. Goebel, can you form any opinion as to how fast the water would go through Bay 8 at two dogs at a staff gauge of approximately 73?

Mr. Carney: I will interpose an objection. He is not qualified as an expert to answer that question.

Q. (By Mr. Hazard): All right; I will ask you, then, have you made any observation of water,

(Deposition of Grover G. Goebel.)

of the velocity of water going through the gates?

A. I beg your pardon? I didn't hear with all the noise outside.

Q. Have you made any observation of the velocity of water going through the gates?

A. Naturally.

Q. You have done that over the course of the years of your experience there? A. Yes, sir.

Q. Can you form any opinion as to the velocity of the water going through Gate 8 at two dogs?

A. The velocity of water going through Bay 8 at two dogs is plenty heavy.

Q. Could you express that in feet per second or miles per hour?

A. I can't. I have a chart at home which I don't have to refer to myself. The control room has that, and I also have a chart at my desk which gives me that amount going under that gate, but I don't have that knowledge in my brain.

Q. You work from a chart which sets that forth? A. Yes, sir.

Q. Those figures have been worked out; is that correct? A. That is right.

Q. Do you have any—does that chart refer to the volume of water?

A. That is what the chart is for, how much water we are passing under any gate at any given point at any certain gate elevation.

Q. Would that indicate both velocity and volume? A. Not velocity; volume, I believe.

Q. Do you have any idea based on your observation about the velocity alone?

(Deposition of Grover G. Goebel.)

A. No, I have no idea what your velocity would be. It was never measured, to my knowledge. I never measured it.

Q. About how far downstream with the gate open, with two dogs open, is the turbulence such that you can see bubbling [104] white water? Can you form any estimate as to the distance downstream?

A. Downstream from the open gate your water comes through, hits your baffles, builds up into that swirl, you know. We all know that. Then you see white water down below. What you call white water would be caused from the rush of the water, oh, a couple hundred of feet.

Q. Is there an initial turnaround; then there is white water a couple hundred feet; is that correct?

A. Yes, sir.

Q. In that initial turnaround about how far does that extend out from the dam?

A. Oh, roughly estimated, about between 40 and 50 feet from the pier noses. That is an estimate.

Q. About how far from the seal—is that the correct designation—the bottom of the gate?

A. That is right.

Q. From the seal to the water level below the dam, how far is that distance?

A. Well, that is determined by the elevation of the tailrace. The seal is at plus 24. I believe I am right on that now. That is the seal of the crest of the ogee. Then, of course, the water, whatever water elevation you had.

(Deposition of Grover G. Goebel.)

Q. Does your record show what the elevation of the tailrace was on this—— [105]

A. My records don't show that; no, sir.

Q. The powerhouse has that?

A. The powerhouse has that.

Mr. Carney: There are records on that.

Q. (By Mr. Hazard): With respect to this spillway dam?

The Witness: Yes, sir.

Q. If you had a gate open—if Gate 8 were open two dogs and you had an order to close it, how long would it take you to execute that order?

A. All depends where the lift boom of the crane is.

Q. That moves up and down across the face of the dam?

A. Up and down on the dock, and the lift boom moves a foot per minute.

Q. How long is the distance from the end of the Gate 2 to the end of Gate 17, the breadth of the track on which the crane moves?

A. How much distance from Bay 2 to 17?

Q. How long is the track on which that crane moves?

A. Oh, we just have to multiply that, I don't know offhand. That would be about 54 feet to the bay, I think, center to center, roughly speaking, times that many bay from Bay 2 to 17.

Q. Once you get the crane into place, how long would it take you to move a gate down two dogs?

(Deposition of Grover G. Goebel.)

A. Approximately 30 minutes, roughly speaking. [106]

Q. Would that be true of all the gates?

A. All but the 60's. They are 10 feet high. That would cut off about ten minutes off the operation.

Q. Which are the 60's?

A. I beg your pardon?

Q. Which are the 60's?

A. The 60's are, as a rule, in Bay 2, 3, 16, 17, plus 18. Of course, we are not counting 1 and 18. They are dead.

Q. They are on the ends?

A. They are on the ends.

Mr. Hazard: That is all.

Mr. Carney: No further questions.

(Discussion off the record.)

Mr. Hazard: Mr. Goebel, you have a right under the Federal Rules of Civil Procedure to read your deposition and to sign it; that is, at the time that the Reporter writes it out on the typewriter. You can read it over and then sign it, or you can waive your right and simply rely on the fact that he is taking your testimony down correctly. You *might* to consult with Mr. Carney.

The Witness: I waive.

(Deposition concluded.)

(Reading and signature waived.) [107]

[Endorsed]: No. 15685. United States Court of Appeals for the Ninth Circuit. Henry L. Hess, Jr., Administrator of the Estate of George William Graham, deceased, Appellant, vs.. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: August 27, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 241]

**IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—

May 16, 1958

(omitted in printing)

[fol. 242]

**IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Before: Healy, Pope and Hamley, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND
RECORDING OF JUDGMENT—August 20, 1958

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 243]

**IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 15,685—Aug. 20, 1958

HENRY L. HESS, JR., Administrator of the Estate of
George William Graham, Deceased, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court
for the District of Oregon

Before: Healy, Pope, and Hamley, Circuit Judges.

OPINION—August 20, 1958

Hamley, Circuit Judge:

The sinking of a tug and barge being utilized in repairing the spillway deck of Bonneville Dam gave rise to this action. Five of the six men on board the tug and barge lost their lives. The administrator of the estate of one of these men brought this action against the United States, to recover damages for wrongful death. Jurisdiction was asserted under the Tort Claims Act, 28 U.S.C.A., §§ 1346(b), 2674.¹

[fol. 244] The case was tried without a jury. Plaintiff asked the court to render judgment in his favor under the provisions of the Employers' Liability Law of Oregon

¹ 28 U.S.C.A., § 1346(b):

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C.A., § 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively; for whose benefit the action was brought, in lieu thereof."

(Liability Law).² In the alternative, he sought recovery under the Oregon Wrongful Death Act.³ The Government's position was that, since the accident occurred on navigable waters within the territorial limits of Oregon, only the [fol. 245] Wrongful Death Act could be applied, and that the United States was not liable thereunder.

The trial court held that the Liability Law did not apply, and that the plaintiff failed to prove a breach of duty which would make the United States liable under the Wrongful Death Act. Judgment was therefore entered for defendant. Plaintiff appeals, challenging the determinations made by the trial court with regard to each of these statutes.

The facts necessary to be considered on this appeal, as set out below, are drawn from undisputed findings of fact entered by the trial court.

Bonneville Dam, owned and operated by the United States, is located on the Columbia River, between the states

² ORS 654.305:

"Generally, all owners, contractors, or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

³ ORS 30.020:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased."

of Oregon and Washington. The Columbia River constitutes navigable waters of the United States, and the point where the accident occurred, as set out below, lies within the jurisdiction of the state of Oregon.

Bonneville Dam consists of several facilities, including a powerhouse which lies between the Oregon shore and Bradford Island, and a spillway dam which lies between the island and the Washington shore. The spillway dam contains eighteen bays, which, for convenience herein, are numbered 1 through 18, starting with the fishway bay on the Washington shore as bay 1.

In each bay, there is a movable gate fifty feet wide and fifty feet high. These gates are opened and closed by being lifted or lowered in a vertical direction. When shut, they rest on the top of the "ogee" section, which is the upper line of the submerged stationary portion of the dam. On the bed of the river, extending downstream across the width of the dam, is a concrete structure called the baffle deck. This deck is dotted with concrete blocks called "baffles," which are built into the deck. Their function is to dissipate the energy of the water discharged through the dam, and to reduce its downstream velocity.

In the interval between the completion of the dam in 1938 and the summer of 1954, the baffles had become eroded by the flow of water. Desiring to restore them to their original condition, the United States entered into a contract with Larson Construction Company (Larson), "an independent contractor. The contract contemplated the [fol. 246] construction of a cofferdam closing off the south half of the spillway baffle deck. It was understood that construction of this cofferdam would be commenced while water was being discharged through the spillway dam.

By the terms of the contract, Larson was obliged to inform the United States of all steps proposed to be taken which would affect the operation of the dam. The contractor was to supply all equipment, including the tug and barge involved in this action, and all labor used in the performance of the contract. The United States had no control over the manner or method by which the work under the contract was to be accomplished. It was interested only

in the general result in conformity with the contract specifications. The United States, however, retained a right to inspect the work of the contractor. The contract further contemplated that the operation of the dam, including the spillway dam gates, would be conducted by personnel of the United States.

On August 13, 1954, the United States notified Larson that the water level of the river was such that work under the contract should commence no later than August 23, 1954. On the same day (Aug. 13, 1954), following a conference between personnel of the United States and the contractor, it was found possible to close gates 11 through 17. This included all of the gates on the south half of the spillway dam from gate 11 southward toward Bradford Island, except for the fishway gate. These gates were closed on that date, and remained closed during all times material to this suit.

The Government inspector in connection with this work was Patrick S. Leonti. In addition to his inspection duties, Leonti was to act as liaison between the contractor and Government employees concerned with the operation of the dam. Leonti informed Larson that any requests for closing the gates in the spillway dam should be made through him.

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib. This crib was to rest in bay 9, starting at the top of the ogee curve and running at right angles to the face of the dam. Larson concluded that the curved slope, as originally constructed, may have become eroded to some degree. He therefore determined that it was necessary to take sound- [fol. 247] ings in bay 9, for the purpose of establishing the true cross section of the ogee at that time.

On August 18, 1954, the contractor's representative informed Leonti that the contractor proposed to take soundings in bay 9 on August 20, 1954. This would be done, Leonti was informed, by taking a tug and barge into bay 9, and taking soundings off the side of the barge. Leonti was requested to have the gates in bays 9 and 10 closed by 12:30 p.m. on August 20, to facilitate the planned operations.

Leonti forwarded this request to the operations division of the dam, and, at the designated time, gates 9 and 10 were closed. Gates 11 through 17 had already been closed, as previously indicated. Larson sought no advice from the Government personnel at the dam, and the latter gave Larson no advice as to the hazards of the proposed sounding operation.

The day before this operation was to take place, the contractor's superintendent performed a reconnaissance run in another tugboat in the same area. His purpose was to determine whether it would be a safe operation. Based on this reconnaissance run and on personal observation, Larson determined that the operation could be safely performed.

Shortly before 2:00 p. m., on August 20, 1954, Larson's tug "Muleduzer," pushing his barge, set out from Bradford Island. The barge was made fast to the tug by four steel lines, and the two craft were, in effect, a unit. The equipment and personnel to be utilized in the operation were selected solely by Larson.

No employee of the United States participated in this operation, or gave the contractor or any of his employees any directions or orders with respect to it. Nor was there any intermingling of employees of the United States with those of the contractor in connection with the work being performed at the time of the accident. Appellant's decedent was a member of the sounding party aboard the tug. He occupied a nonsupervisory capacity, and had no control with respect to the manner in which the sounding operation was to be conducted.

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and headed [fol. 248] upstream for bay 9. At this time, the flow of the Columbia River was 191,100 cubic feet per second. Of this flow, 52,300 cubic feet per second was being discharged through the spillway dam. Gate 8 was then open thirty-two inches, and 5,700 cubic feet of water per second was flowing through it. Gate 6 was open to the same extent, and accommodated the same flow of water. Gate 7 was open fifty-five inches, and 9,100 cubic feet of water was flowing through it.

As the tug and barge approached bay 9, the turbulent condition of the water in the spillway basin was open, apparent, and obvious to all, including the contractor, the operator of the tugboat, and the other employees of the contractor. The difference in elevation of the water in the turbulent area opposite the open gates, as compared with the area opposite the closed gates, was also visible and obvious.

When the barge reached bay 9, it veered north. The port bow of the barge struck the pier between bays 9 and 8, stoving a hole in the bow of the barge. As water came through the hole, the barge moved over in front of bay 8 and the other open bays north of bay 8. The barge and tug were swamped and sunk, with the barge being broken to pieces. The men aboard the tug and barge were thrown into the water, and all were drowned except one deckhand.

The immediate cause of the accident and the deaths of the men was the turbulent condition of the water. This condition made it impossible to control the movements of the tug and barge, and caused the barge to strike the pier.

On these facts, the trial court held, as previously noted, that the Liability Law was not applicable. The court did so for two separate and distinct reasons: (1) the Liability Law could not be constitutionally applied in this case, and (2) if it could be applied, the United States was not liable thereunder because it was not responsible for the work being performed by the decedent.

With regard to the first of these reasons, the trial court was invoking the principle that precludes the application of state statutes which "work material prejudice to the characteristic features of the general maritime law. . . ." *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216.

[fol. 249] In order for this principle to control this case, the trial court must have made two determinations: First, it must have held that the circumstances of the case called for application of the general maritime law, with modification or supplementation by Oregon statutes which would not work material prejudice to the characteristic features of the general maritime law. Second, it must have held that the Liability Law did not constitute constitutionally permissible supplementation of the general maritime law.

Appellant argues that the trial court erred with regard to each of these determinations.

Had this been a suit between private persons to recover damages for personal injuries rather than wrongful death, the general maritime law would unquestionably apply. This is true because admiralty jurisdiction depends upon whether the injury was inflicted upon navigable water, irrespective of where the wrongful acts or omissions occurred. The *Plymouth*, 70 U. S. 20, 36.⁴ Here it is established that the accident occurred on navigable water.

But, since the workman in this accident was killed, it would have been constitutionally permissible, in a suit between private persons, to apply the Oregon Wrongful Death Act, instead of the general maritime law, which provides no remedy for wrongful death. In *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242, it was held that application of a state wrongful death act, under such circumstances, will not work material prejudice to the characteristic features of the general maritime law. See, also, *Thompson v. Union Fisherman's Co-op Packing Co.*, 128 Ore. 172, 273 Pac. 953.

Since the Oregon Wrongful Death Act would thus have been applied in a suit between private persons, this would [fol. 250] seem to require a like holding in this suit, in which the United States is the defendant.⁵

Appellant, however, points to the closing words of 28 U.S.C.A., § 1346(b) a provision of the Tort Claims Act, as calling for a different result. The statutory language relied

⁴ An exception is made where the subject-matter of the litigation is a matter of mere local concern. *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 477. See, also, *Hahn v. Ross Island Sand & Gravel Co.*, _____ Ore. _____, 320 P.2d 668. But here it cannot be doubted that the activities in which decedent was engaged had a direct relation to navigation and commerce. *Bonneville Dam* has been recognized by the supreme court of Oregon as an aid to navigation. *Atkinson v. State Tax Commission*, 156 Ore. 461, 62 P.2d 13, 67 P.2d 161, affirmed, 303 U. S. 20. See, also, section 1 of the act authorizing the Bonneville Project, approved August 20, 1937 (16 U.S.C.A., § 832), which begins: "For the purpose of improving navigation on the Columbia River and for other purposes incidental thereto. . . ."

⁵ See the "if a private person" and "as a private individual under like circumstances" clauses of the Tort Claims Act, footnote 1.

upon reads: ". . . Where the United States, if a private person, would be liable to the claimant in accordance with the law of the place *where the act or omission occurred.*" (Emphasis supplied.)

Appellant argues that the quoted language operates to change the general conflicts rule which would apply the law of the place where the accident occurred, and requires application of the law where the wrongful acts or omissions occurred. Since the asserted negligent acts or omissions of the United States took place on the spillway section of Bonneville Dam, which, he asserts, is an extension of Oregon land, it is contended that the general maritime law has no application. Therefore, the proper law to be applied, appellant urges, is the Liability Law, as that is the law which would be applied between private persons in an action based on negligence occurring on land in that state. Under this theory, the question of whether the Liability Law would work material prejudice to the characteristic features of the general maritime law would be immaterial.

Inherent in appellant's analysis, summarized above is the proposition that the statutory words, "place where the act or omission occurred," mean the place where the act or omission first manifested itself. Support for this proposition is to be found in the majority opinion in *Eastern Air Lines v. Union Trust Company*, D.C.Cir., 221 F.2d 62, 80.

This court, however, has given these statutory words a different construction. In *United States v. Marshall*, 9 Cir., 230 F.2d 183, 187, it was held that these words mean the place where the negligence, either of act or omission, "became operative, directly causing the injury and not places where the negligence existed but was then inoperative."

[fol. 251] Applying this rule here, it follows that any act or omission of Government personnel on Bonneville Dam became operative, directly causing injury, on the navigable waters of the Columbia River. It was there that the tug and barge went out of control and were swamped and sunk by reason of the force, turbulence, and volume of water coming through the spillway gates. Hence the tort law to be applied is that which Oregon would apply with regard to a tort committed on its navigable waters.

But, even if it were to be assumed that the law which controls is that of the place where the act or omission first manifested itself, there are other considerations which call for rejection of appellant's ultimate conclusion.

The "place" referred to in the statute means the state in which the act or omission occurred, not a particular locality or kind of terrain within the state (such as Bonneville Dam), as appellant assumes. In our view, the context, and particularly the immediately preceding statutory words, "the law of the," require this conclusion.

Moreover, the "law" of the state to be applied is not limited to the law having direct reference to tort liability. It includes, also, the law of the state concerning conflict of laws (as in diversity cases) and the law to be applied in determining whether an admiralty or nonadmiralty case is presented. This conclusion is required because the statutory words, "law of the place," are broad enough to include the areas last mentioned, and those areas are not excepted in the statute.

This conclusion is also required because the more limited construction which appellant would place on this language runs counter to other provisions of the Tort Claims Act. The accident here in question actually occurred on navigable water. In a suit between private persons, Oregon would have applied the general maritime law as supplemented by state statutes which will not work material prejudice to the characteristic features of the general maritime law.

The United States is entitled to similar treatment, else it would not be liable "in the same manner and to the same extent as a private individual under like circumstances," as [fol. 252] required by the Tort Claims Act, 28 U.S.C.A., §§ 1346(b), 2674. In order for the government to receive this similar treatment, it must be held that the Oregon law to be applied includes the law of conflicts and the law to be applied in determining whether this is an admiralty or non-admiralty case.

The view just expressed is not in harmony with the result reached in *Eastern Air Lines v. Union Trust Company*, *supra*. The reason the majority in that case restricted "the law of the place" to be applied to tort liability law,

and excluded these other areas of substantive law, is not indicated in the opinion. The precise question of whether admiralty or nonadmiralty law should be applied was not presented in the Eastern Air Lines case.

For the reason indicated, we are of the opinion that the Liability Law may not be applied in this case, unless it is a constitutionally permissible supplementation of the general maritime law. We now consider whether it is.

A provision of the Liability Law requires all owners, contractors, subcontractors, or other persons having charge of, or being responsible for, any work involving a risk or danger to the employees or the public to "use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices." ORS 654.305.

Under this statute, the circumstances under which one person may have some duty of care with regard to another person are enlarged over those prevailing under the general maritime law. More important, the standard of care which must be met in fulfilling such duty is greatly increased over what it would be under general maritime law.

Appellant has acknowledged that the standard of care required under the Liability Law is higher than under the general maritime law, where, as here, the doctrine of unseaworthiness has no application. The supreme court of [fol. 253] Oregon has also so held.⁶ That court has also expressly held that, where the rights of the parties are to be determined by the maritime law, the provisions of the Liability Law are not applicable. *Hawkins v. Anderson & Crowe*, 84 Ore. 94, 164 Pac. 556, 558.⁷

Appellant points out that, with respect to defenses, the Liability Law is closer to the general maritime law than is

⁶ *Hoffman v. Broadway Hazelwood*, 139 Ore. 519, 10 P.2d 349, 11 P.2d 814; *Fromme v. Lang & Co.*, 131 Ore. 501, 281 Pac. 120.

⁷ See, also, *Sanderson v. Sause Bros. Ocean Towing Co.*, 114 F.Supp. 849. Contra, *Keithley v. North Pacific SS Co.* (D. Ct.) 232 Fed. 255.

the common law, which would be applied under the Oregon Wrongful Death Act.* What is lost sight of, however, is that, under the general maritime law, appellant could not even get into court, because an action for wrongful death will not lie.

The courts have come to the aid of the plaintiff in this circumstance to the extent of making available a state wrongful death statute. Under that statute, however, a defendant is chargeable with no greater standard of care than would be the case under the maritime law, and he gains the benefit of the more effective defenses of the common law. See 1 Benedict on Admiralty, 6th ed., 392, § 148. On balance, this is held to produce a result which does not work material prejudice (sic) to the characteristic features of the general maritime law.

What appellant is asking for, however, would upset this balance in two particulars. While gaining, as in the case of the Wrongful Death Act, an avenue of relief not available in admiralty, he would also (1) benefit from an increase in the standard of care which the Liability Law would place upon appellee, and (2) escape the more effective defenses [fol. 254] which he would have to meet were the Wrongful Death Act being applied. In our view, the result would be an unconstitutional displacement of the essential features of general maritime law.

We therefore conclude that the trial court did not err in holding that the Liability Law could not be constitutionally applied in this case."

* Appellant draws this comparison between the defenses which are available:

<i>Incident</i>	<i>Common Law</i>	<i>Maritime Law</i>	<i>Employers' Liability Law</i>
Contributory negligence	Complete Defense	Mitigation of damages	Mitigation of damages
Assumption of risk	Complete Defense	Mitigation of damages	No defense
Negligence of fellow servant	Complete Defense	No defense	No defense

" It is unnecessary for us to consider whether the trial court was also correct in ruling that, if that act were applied, the United States would not be liable thereunder because it was not responsible for the work being performed by the decedent.

The final question presented is whether the trial court erred in determining that appellant was not entitled to recover under the Oregon Wrongful Death Act because negligence had not been proved.

In questioning this determination, appellant does not attempt to charge the United States with negligence, if any, of the independent contractor. It argues, however, that the United States is here in the same position that an owner of premises would be with respect to employees of an independent contractor engaged in work on the premises. Contending that Government personnel must have been aware of the hazards of navigating the tug and barge in bay 9, under the conditions then existing, appellant asserts, in effect, that they should have decreased the hazard (presumably by closing additional gates in the area), or should have warned the contractor of the extreme danger.

We assume, for present purposes, that the United States owed a duty to decedent equivalent to that owed by an owner of premises to the employee of an independent contractor working on the premises. We also agree with appellant that, under the evidence, Government personnel charged with operating the dam were aware of the amount and velocity of water which was going through the spillway gates at the time of the accident. A finding of fact, if the trial court had made it, that Government personnel must have realized that the proposed sounding operation involved a certain amount of danger, would also be supportable.

But we find no basis in the record for the inference appellant wants us to make, that Government personnel "were [fol. 255] aware of the limited power of the tug Mufeduzer, and its inability to cope with the turbulent water in the spillway basin. . . .". Nor does the evidence warrant a finding appellant would have us make, that Government personnel knew, or should have known, that the contractor and his employees "did not fully appreciate the great danger created by the spillway gates immediately adjacent to bay 9 being permitted to remain open."

The record indicates that the contractor had more information concerning the hazards to be met than did Government personnel. The amount and velocity of the flow

through the spillway gates were known to him. The turbulence it created was open and apparent. In addition, the contractor knew the capabilities of his tug, and was familiar with the way it and the barge could be operated. He had also made a personal reconnaissance of the area on the previous day. With all of this information, he yet misjudged the danger. Government personnel, with less information, could not be expected to have a better appreciation of the danger.¹⁹

Dye v. United States, 6 Cir., 210 F.2d 123, cited by appellant, is inapposite. There, actions were brought to recover for the wrongful death of several persons who were drowned when their small boats were sucked by a strong current through an open wicket of a dam on the Ohio River. It was held that the United States was negligent in its failure to use protective measures for the benefit of navigators, and to give adequate warning of the dangerous condition at the dam to small boats navigating near it.

In the *Dye* case, the open wickets on the dam amounted to a latent hazard, not perceivable by members of the public boating upstream. In our case, however, the turbulent condition of the water was observable, and observed, by all. Here, in addition, the contractor had made an independent study of the hazards involved, and had satisfied himself that the work could be safely accomplished.

[fol. 256] If it be assumed, however, that the negligence of Government personnel could be inferred from the evidence, it was not a necessary inference, and the trial court was not required to make it. As stated in *United States v. Marshall*, 9 Cir., 230 F.2d 183, 187, "negligence is ordinarily a question of fact to be resolved by the trier of fact. [Citing cases.] It is only where the facts are undisputed and where but one reasonable conclusion can be drawn therefrom the negligence becomes a question of law."

Whether the determination of the trial court that there was no breach of common-law duty owing to decedent is

¹⁹ Had the contractor asked for the closure of more gates, this would presumably have been done. Had it not been done, the contractor could have declined to proceed. The sounding operation was not specifically required by the contract.

viewed as a finding of fact or a conclusion of law, we hold that, in making that determination, the trial court did not err.

AFFIRMED.

[fol. 257]

**IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 15,685

**HENRY L. HESS, JR., Administrator of the Estate of
George William Graham, deceased, Appellant,**

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—Filed August 20, 1958

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and order of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted]

[fol. 258] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 259]

SUPREME COURT OF THE UNITED STATES

No. 438, October Term, 1958

HENRY L. HESS, JR., Administrator of the Estate of
George William Graham, Deceased, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—March 2, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

the statute refers to the law of the place where the negligence became operative, directly causing injury, thus calling for the application of general maritime law. (cf. *Jordan v. States Marine Corporation*, 257 F.(2d) 232 [C.A. 9].)

The appellate court further held that the word "place" referred to in the statute means the state in which the act or omission occurred, not a particular locality or kind of terrain. Therefore, in applying the law of a particular state, the court should include the state's conflicts of law rules and the state law to be applied in determining whether an admiralty or non-admiralty case is presented.

Apart from this interpretation of the federal statute, the Court of Appeals also held that because of the higher than common law standard of care prescribed by the Oregon Employers' Liability Act, its application to this case would result in an "unconstitutional displacement of the essential features of general maritime law."

Office Supreme Court, U.S.

OCT 13 1959

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~111~~ 5

HENRY L. HESS, JR., Administrator of the Estate
of George William Graham, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 4

Reasons for Granting the Writ 8

I An important question as to the proper interpretation of the Federal Tort Claims Act is directly presented; there is a conflict between the decision of the court below and the Court of Appeals for the District of Columbia in *Eastern Air Lines v. Union Trust Company*, 221 F.(2d) 62, 80. cert. den. sub nom. *Union Trust Co. v. United States*, 350 U.S. 911.

Conclusion 10

Appendix A 11

Opinion of the United States Court of Appeals for the Ninth Circuit.

TABLE OF CASES

	Page
Eastern Air Lines v. Union Trust Company, 221 F.(2d) 62 (Ct. App. D.C.): cert. den. sub nom. Union Trust Co. v. United States; 350 U.S. 911	8, 9
Jordan v. States Marine Corporation, 257 F.(2d) 232 (C.A. 9)	7
Sanderson v. Sause Bros. Ocean Towing Co., 144 F. Supp. 849 (D.C. Or.)	6
Southern Pacific Co. v. Jensen, 244 U.S. 205	6
United States v. Marshall, 230 F.(2d) 183, 187 (C.A. 9)	6
Vancouver S. S. Co. Ltd. v. Rice, 288 U.S. 445	10

STATUTES

30.020 Oregon Revised Statutes	5
654.305 Oregon Revised Statutes	3
654.325 Oregon Revised Statutes	3, 5
28 U.S.C.A. § 1254(1)	2
28 U.S.C.A. § 1346(b)	2, 3, 4, 6, 8
28 U.S.C.A. §§ 2671-2680	4

In the Supreme Court of the United States

OCTOBER TERM, 1958

No.

HENRY L. HESS, JR., Administrator of the Estate
of George William Graham, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of dismissal entered by the United States District Court for the District of Oregon.

OPINIONS BELOW

The opinion of the District Court is reported at 1958 AMC 660 (also R. 47-48). The opinion of the Court of Appeals (R. 243-256) has not yet been reported but is printed in Appendix A hereto, infra pp. 11-28.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. In a Federal Tort Claims Act death action to recover damages on account of the drowning of petitioner's decedent on the navigable waters of the Columbia River within the State of Oregon, where respondent's liability was predicated upon the failure of its employees on Bonneville Dam, a shore structure, to regulate properly the flow of water through the spillway gates, were the courts below bound to apply the statutory law of Oregon applicable to non-maritime torts in view of Section 410(a) of the Tort Claims Act (28 U.S.C.A., § 1346(b)) which measures respondent's liability "in accordance with the law of the place where the [negligent] act or omission occurred"?

II. Assuming for purposes of argument only that the courts below were correct in ruling that Oregon law relating to maritime torts should govern, does not the right of action for wrongful death created by the Oregon Employers' Liability Law constitute a permissible modification and supplementation of the general maritime law so as to be applicable herein?

STATUTES INVOLVED

Section 410(a) of the Federal Tort Claims Act (28 U.S.C.A., § 1346(b)) provides:

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The pertinent provisions of the Employers' Liability Law of Oregon (ORS 654.305 and ORS 654.325) are as follows:

"Protection and safety of persons in hazardous employment generally. Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

* * * * *

"Who may prosecute damage action for death; damages unlimited. If there is any loss of life by reason

of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named."

STATEMENT OF THE CASE

This action to recover \$100,000 general damages and \$941.65 special damages on account of the wrongful death of petitioner's decedent was filed in the district court under the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.

For the purpose of presenting the legal issues to this Court, the essential facts may be summarized as follows:

Petitioner's decedent was employed as a carpenter foreman by Robert C. Larson, dba Larson Construction Company, who had a contract with respondent for the reconstruction and repair of a portion of the spillway baffle deck of Bonneville Dam, located on the Columbia River, owned and operated by the respondent. Preliminary to the commencement of actual work, Larson decided to take soundings off a barge to determine more accurately the correct specifications for a timber crib which was to be part of a cofferdam to be erected

in the river below the dam as a necessary part of the repair project.

After conferences with respondent's employees with respect to the projected movements of the tug and barge which was to be used in carrying out the sounding operation, certain of the spillway dam gates were closed, but gates in bays 1, 2, 3, 4, 5, 6, 7 and 8 were allowed to remain open, bay 8 being immediately adjacent to the place where the tug was to push the barge for the sounding operation.

The decedent was a member of the four-man sounding party, and he was drowned when the barge struck the pier between bay 8 and bay 9, stoving a hole in the barge and resulting in the sinking of the tug and barge.

The district court found as a fact that the immediate cause of the accident and the death was the turbulent condition of the water which made it impossible to control the movements of the tug and barge and caused the barge to strike the pier.

In the trial court, petitioner based respondent's liability both upon the general Oregon wrongful death statute (ORS 30.020) and upon the statutory cause of action for wrongful death created under the Oregon Employers' Liability Law (ORS 654.325), it being petitioner's theory that in its exercise of its exclusive control over the operation of the dam, particularly in regulating the turbulence of the water through the closing of enough gates so as to furnish a quiet pool in which to work, respondent had failed to use every device, care and

precaution which it was practicable to use for the protection and safety of life and limb without impairing the efficiency of the operation (R. 6-8).

The trial court held that the Oregon Employers' Liability Act was not applicable and that the high standard of care required under the Act, if applied to this case, would be unconstitutional under the doctrine of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, and *Sanderson v. Sause Bros. Ocean Towing Co.*, 114 F. Supp. 849 (D.C. Or.) (R. 47-48, 60). Thus, the basis of the trial court's decision was that since the death occurred on navigable waters of the United States, general maritime law governed, and that to apply the higher standard of care prescribed by the Employers' Liability Law would work a material prejudice to the uniformity of general maritime law. In so ruling, the district court purported to follow the law of the place where the accident and the resulting death occurred.

The Court of Appeals for the Ninth Circuit rejected petitioner's argument that general Oregon law applicable to non-maritime torts applied because of the statutory language in Section 410(a) of the Tort Claims Act (28 U.S.C.A. 1346(b)) that respondent's liability should be measured according to the "law of the place where the act or omission occurred," in view of the fact that the asserted negligent acts or omissions of the United States took place on the Bonneville Dam, an extension of the land.

The Court of Appeals, following its decision in *United States v. Marshall*, 230 F.(2d) 183, 187, held that

REASONS FOR GRANTING THE WRIT**I**

An important question as to the proper interpretation of the Federal Tort Claims Act is directly presented; there is a conflict between the decision of the court below and the Court of Appeals for the District of Columbia in *Eastern Air Lines v. Union Trust Company*, 221 F.(2d) 62, 80. cert. den. sub nom. *Union Trust Co. v. United States*, 350 U.S. 911.

The decision of the Court of Appeals for the Ninth Circuit with respect to the proper interpretation of Section 410(a) of the Tort Claims Act (28 U.S.C.A., § 1346 (b)) is admittedly in direct conflict with the decision of the Court of Appeals for the District of Columbia in *Eastern Air Lines v. Union Trust Company*, 221 F.(2d) 62, cert. den. sub nom. *Union Trust Co. v. United States*, 350 U.S. 911.

In the *Eastern Air Lines* case, the United States was sued in a Tort Claims Act case arising out of the death of an airline passenger who lost his life in an accident which occurred over the Potomac River which is in the District of Columbia. Liability was predicated upon negligent acts and omissions of airport tower operators employed by the United States who allegedly gave both planes permission to land at the same time. The tower was located in the State of Virginia. A majority of the Court of Appeals held that Virginia law governed the liability of the United States and modified the judgment from \$50,000 to \$15,000 to meet the limits of the Virginia law governing wrongful death, irrespective of the fact that the negligence first became

operative and directly caused the injury in the District of Columbia. This Court denied a petition for a writ of certiorari (350 U.S. 911).

The Court of Appeals for the Ninth Circuit in the instant case has held that the phrase "in accordance with the law of the place where the act or omission occurred" means the place where the negligence "became operative directly causing the injury and not places where the negligence existed but was then inoperative."

In view of the irreconcilable conflict between the interpretation put on the statutory phrase by the two appellate courts, it would appear that Judge Hamley's observation is an understatement: "The view just expressed is not in harmony with the result reached in *Eastern Air Lines v. Union Trust Company*, supra."

This conflict between the two courts of appeal involves an important question of federal statutory interpretation which should be settled once and for all by this Court. The importance of a final decision on this point is indicated by the fact that in the *Eastern Air Lines* case the attorneys for the Government were successful in urging upon the District of Columbia court a statutory interpretation which resulted in the reduction of an adverse judgment from \$50,000 to \$15,000. In the instant case, the Government attorneys were equally successful in urging a contrary construction of the same statute upon the Court of Appeals for the Ninth Circuit in order to sustain a judgment of dismissal in favor of the Government.

CONCLUSION

The primary question presented is one of importance and will undoubtedly be present in many other Tort Claims Act cases involving multi-state torts, as well as injuries or deaths on navigable waters resulting from negligent ship repairs or other conduct occurring on land. The plain wording of the phrase "the law of the place where the act or omission occurred" is proof that Congress intended the word "place" to have a wider meaning than "state," and to refer to the fundamental distinction between admiralty and land torts. (See *Vancouver S. S. Co. Ltd. v. Rice*, 288 U.S. 445, 447, where Mr. Justice Butler wrote: "The right to recover for death depends upon the law of the place of the act or omission that caused it and not upon that of the place where the death occurred [citations].")

To resolve the conflict between the two courts of appeal, and to furnish an authoritative guide for future anticipated litigation involving the same question, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLEVELAND C. CORY,
1410 Yeon Building,
Portland 4, Oregon,
Attorney for Petitioner.

APPENDIX A**OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

No. 15,685, August 20, 1958, Hamley, C.J.:

The sinking of a tug and barge being utilized in repairing the spillway deck of Bonneville Dam gave rise to this action. Five of the six men on board the tug and barge lost their lives. The administrator of the estate of one of these men brought this action against the United States, to recover damages for wrongful death. Jurisdiction was asserted under the Tort Claims Act, 28 U.S.C.A., §§ 1346(b), 2674.¹

¹28 U.S.C.A., § 1346(b):

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court for the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C.A., § 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought in lieu thereof."

The case was tried without a jury. Plaintiff asked the court to render judgment in his favor under the provisions of the Employers' Liability Law of Oregon (Liability Law).² In the alternative, he sought recovery under the Oregon Wrongful Death Act.³ The Government's position was that, since the accident occurred on navigable waters within the territorial limits of Oregon, only the Wrongful Death Act could be applied, and that the United States was not liable thereunder.

The trial court held that the Liability Law did not apply, and that the plaintiff failed to prove a breach of duty which would make the United States liable under the Wrongful Death Act. Judgment was therefore entered for defendant. Plaintiff appeals, challenging the determinations made by the trial court with regard to each of these statutes.

²ORS 654.305:

"Generally, all owners, contractors, or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

³ORS 30.020:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased."

The facts necessary to be considered on this appeal, as set out below, are drawn from undisputed findings of fact entered by the trial court.

Bonneville Dam, owned and operated by the United States, is located on the Columbia River, between the states of Oregon and Washington. The Columbia River constitutes navigable waters of the United States, and the point where the accident occurred, as set out below, lies within the jurisdiction of the state of Oregon.

Bonneville Dam consists of several facilities, including a powerhouse which lies between the Oregon shore and Bradford Island, and a spillway dam which lies between the island and the Washington shore. The spillway dam contains eighteen bays, which, for convenience herein, are numbered 1 through 18, starting with the fishway bay on the Washington shore as bay 1.

In each bay, there is a movable gate fifty feet wide and fifty feet high. These gates are opened and closed by being lifted or lowered in a vertical direction. When shut, they rest on the top of the "ogee" section, which is the upper line of the submerged stationary portion of the dam. On the bed of the river, extending downstream across the width of the dam, is a concrete structure called the baffle deck. This deck is dotted with concrete blocks called "baffles," which are built into the deck. Their function is to dissipate the energy of the water discharged through the dam, and to reduce its downstream velocity.

In the interval between the completion of the dam in 1938 and the summer of 1954, the baffles had become

eroded by the flow of water. Desiring to restore them to their original condition, the United States entered into a contract with Larson Construction Company (Larson), an independent contractor. The contract contemplated the construction of a cofferdam closing off the south half of the spillway baffle deck. It was understood that construction of this cofferdam would be commenced while water was being discharged through the spillway dam.

By the terms of the contract, Larson was obliged to inform the United States of all steps proposed to be taken which would affect the operation of the dam. The contractor was to supply all equipment, including the tug and barge involved in this action, and all labor used in the performance of the contract. The United States had no control over the manner or method by which the work under the contract was to be accomplished. It was interested only in the general result in conformity with the contract specifications. The United States, however, retained a right to inspect the work of the contractor. The contract further contemplated that the operation of the dam, including the spillway dam gates, would be conducted by personnel of the United States.

On August 13, 1954, the United States notified Larson that the water level of the river was such that work under the contract should commence no later than August 23, 1954. On the same day (Aug. 13, 1954), following a conference between personnel of the United States and the contractor, it was found possible to close gates 11 through 17. This included all of the gates on the south half of the spillway dam from gate 11

southward toward Bradford Island, except for the fishway gate. These gates were closed on that date, and remained closed during all times material to this suit.

The Government inspector in connection with this work was Patrick S. Leonti. In addition to his inspection duties, Leonti was to act as liaison between the contractor and Government employees concerned with the operation of the dam. Leonti informed Larson that any requests for closing the gates in the spillway dam should be made through him.

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib. This crib was to rest in bay 9, starting at the top of the ogee curve and running at right angles to the face of the dam. Larson concluded that the curved slope, as originally constructed, may have become eroded to some degree. He therefore determined that it was necessary to take soundings in bay 9, for the purpose of establishing the true cross section of the ogee at that time.

On August 18, 1954, the contractor's representative informed Leonti that the contractor proposed to take soundings in bay 9 on August 20, 1954. This would be done, Leonti was informed, by taking a tug and barge into bay 9, and taking soundings off the side of the barge. Leonti was requested to have the gates in bays 9 and 10 closed by 12:30 p.m. on August 20, to facilitate the planned operations.

Leonti forwarded this request to the operations division of the dam, and, at the designated time, gates 9 and

10 were closed. Gates 11 through 17 had already been closed, as previously indicated. Larson sought no advice from the Government personnel at the dam, and the latter gave Larson no advice as to the hazards of the proposed sounding operation.

The day before this operation was to take place, the contractor's superintendent performed a reconnaissance run in another tugboat in the same area. His purpose was to determine whether it would be a safe operation. Based on this reconnaissance run and on personal observation, Larson determined that the operation could be safely performed.

Shortly before 2:00 p.m., on August 20, 1954, Larson's tug "Muleduzer," pushing his barge, set out from Bradford Island. The barge was made fast to the tug by four steel lines, and the two craft were, in effect, a unit. The equipment and personnel to be utilized in the operation were selected solely by Larson.

No employee of the United States participated in this operation, or gave the contractor or any of his employees any directions or orders with respect to it. Nor was there any intermingling of employees of the United States with those of the contractor in connection with the work being performed at the time of the accident. Appellant's decedent was a member of the sounding party aboard the tug. He occupied a nonsupervisory capacity, and had no control with respect to the manner in which the sounding operation was to be conducted.

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and

headed upstream for bay 9. At this time, the flow of the Columbia River was 191,100 cubic feet per second. Of this flow, 52,300 cubic feet per second was being discharged through the spillway dam. Gate 8 was then open thirty-two inches, and 5,700 cubic feet of water per second was flowing through it. Gate 6 was open to the same extent, and accommodated the same flow of water. Gate 7 was open fifty-five inches, and 9,100 cubic feet of water was flowing through it.

As the tug and barge approached bay 9, the turbulent condition of the water in the spillway basin was open, apparent, and obvious to all, including the contractor, the operator of the tugboat, and the other employees of the contractor. The difference in elevation of the water in the turbulent area opposite the open gates, as compared with the area opposite the closed gates, was also visible and obvious.

When the barge reached bay 9, it veered north. The port bow of the barge struck the pier between bays 9 and 8, stoving a hole in the bow of the barge. As water came through the hole, the barge moved over in front of bay 8 and the other open bays north of bay 8. The barge and tug were swamped and sunk, with the barge being broken to pieces. The men aboard the tug and barge were thrown into the water, and all were drowned except one deckhand.

The immediate cause of the accident and the deaths of the men was the turbulent condition of the water. This condition made it impossible to control the movements of the tug and barge, and caused the barge to strike the pier.

On these facts, the trial court held, as previously noted, that the Liability Law was not applicable. The court did so for two separate and distinct reasons: (1) the Liability Law could not be constitutionally applied in this case, and (2) if it could be applied, the United States was not liable thereunder because it was not responsible for the work being performed by the decedent.

With regard to the first of these reasons, the trial court was invoking the principle that precludes the application of state statutes which "work material prejudice to the characteristic features of the general maritime law. . . ." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216.

In order for this principle to control this case, the trial court must have made two determinations: First, it must have held that the circumstances of the case called for application of the general maritime law, with modification or supplementation by Oregon statutes which would not work material prejudice to the characteristic features of the general maritime law. Second, it must have held that the Liability Law did not constitute constitutionally permissible supplementation of the general maritime law. Appellant argues that the trial court erred with regard to each of these determinations.

Had this been a suit between private persons to recover damages for personal injuries rather than wrongful death, the general maritime law would unquestionably apply. This is true because admiralty jurisdiction depends upon whether the injury was inflicted upon

navigable water, irrespective of where the wrongful acts or omissions occurred. *The Plymouth*, 70 U.S. 20, 36.⁴ Here it is established that the accident occurred on navigable water.

But, since the workman in this accident was killed, it would have been constitutionally permissible, in a suit between private persons, to apply the Oregon Wrongful Death Act, instead of the general maritime law, which provides no remedy for wrongful death. In *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242, it was held that application of a state wrongful death act, under such circumstances, will not work material prejudice to the characteristic features of the general maritime law. See, also, *Thompson v. Union Fisherman's Co-op Packing Co.*, 128 Ore. 172, 273 Pac. 953.

Since the Oregon Wrongful Death Act would thus have been applied in a suit between private persons, this would seem to require a like holding in this suit, in which the United States is the defendant.⁵

⁴An exception is made where the subject-matter of the litigation is a matter of mere local concern. *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 477. See, also, *Hahn v. Ross Island Sand & Gravel Co.*, Ore. , 320 P.2d 668. But here it cannot be doubted that the activities in which decedent was engaged had a direct relation to navigation and commerce. Bonneville Dam has been recognized by the supreme court of Oregon as an aid to navigation. *Atkinson v. State Tax Commission*, 156 Ore. 461, 62 P.2d 13, 67 P.2d 161, affirmed, 303 U.S. 20. See, also, section 1 of the act authorizing the Bonneville Project, approved August 20, 1937 (16 U.S.C.A., § 832), which begins: "For the purpose of improving navigation on the Columbia River and for other purposes incidental thereto. . . ."

⁵See the "if a private person" and "as a private individual under like circumstances" clauses of the Tort Claims Act, footnote 1.

Appellant, however, points to the closing words of 28 U.S.C.A., § 1346(b) a provision of the Tort Claims Act, as calling for a different result. The statutory language relied upon reads: ". . . Where the United States, if a private person, would be liable to the claimant in accordance with the law of the place *where the act or omission occurred.*" (Emphasis supplied.)

Appellant argues that the quoted language operates to change the general conflicts rule which would apply the law of the place where the accident occurred, and requires application of the law where the wrongful acts or omissions occurred. Since the asserted negligent acts or omissions of the United States took place on the spillway section of Bonneville Dam, which, he asserts, is an extension of Oregon land, it is contended that the general maritime law has no application. Therefore, the proper law to be applied, appellant urges, is the Liability Law, as that is the law which would be applied between private persons in an action based on negligence occurring on land in that state. Under this theory, the question of whether the Liability Law would work material prejudice to the characteristic features of the general maritime law would be immaterial.

Inherent in appellant's analysis, summarized above is the proposition that the statutory words, "place where the act or omission occurred," mean the place where the act or omission first manifested itself. Support for this proposition is to be found in the majority opinion in *Eastern Air Lines v. Union Trust Company*, D.C.Cir. 221 F.2d 62, 80.

This court, however, has given these statutory words a different construction. In *United States v. Marshall*, 9 Cir., 230 F.2d 183, 187, it was held that these words mean the place where the negligence, either of act or omission, "became operative directly causing the injury and not places where the negligence existed but was then inoperative."

Applying this rule here, it follows that any act or omission of Government personnel on Bonneville Dam became operative, directly causing injury, on the navigable waters of the Columbia River. It was there that the tug and barge went out of control and were swamped and sunk by reason of the force, turbulence, and volume of water coming through the spillway gates. Hence the tort law to be applied is that which Oregon would apply with regard to a tort committed on its navigable waters.

But, even if it were to be assumed that the law which controls is that of the place where the act or omission first manifested itself, there are other considerations which call for rejection of appellant's ultimate conclusion.

The "place" referred to in the statute means the state in which the act or omission occurred, not a particular locality or kind of terrain within the state (such as Bonneville Dam), as appellant assumes. In our view, the context, and particularly the immediately preceding statutory words, "the law of the," require this conclusion.

Moreover, the "law" of the state to be applied is not limited to the law having direct reference to tort lia-

bility. It includes, also, the law of the state concerning conflict of laws (as in diversity cases) and the law to be applied in determining whether an admiralty or non-admiralty case is presented. This conclusion is required because the statutory words, "law of the place," are broad enough to include the areas last mentioned, and those areas are not excepted in the statute.

This conclusion is also required because the more limited construction which appellant would place on this language runs counter to other provisions of the Tort Claims Act. The accident here in question actually occurred on navigable water. In a suit between private persons, Oregon would have applied the general maritime law as supplemented by state statutes which will not work material prejudice to the characteristic features of the general maritime law.

The United States is entitled to similar treatment, else it would not be liable "in the same manner and to the same extent as a private individual under like circumstances," as required by the Tort Claims Act, 28 U.S.C.A., §§ 1346(b), 2674. In order for the government to receive this similar treatment, it must be held that the Oregon law to be applied includes the law of conflicts and the law to be applied in determining whether this is an admiralty or nonadmiralty case.

The view just expressed is not in harmony with the result reached in *Eastern Air Lines v. Union Trust Company*, *supra*. The reason the majority in that case restricted "the law of the place" to be applied to tort liability law, and excluded these other areas of sub-

stantive law, is not indicated in the opinion. The precise question of whether admiralty or nonadmiralty law should be applied was not presented in the Eastern Air Lines case.

For the reason indicated, we are of the opinion that the Liability Law may not be applied in this case, unless it is a constitutionally permissible supplementation of the general maritime law. We now consider whether it is.

A provision of the Liability Law requires all owners, contractors, subcontractors, or other persons having charge of, or being responsible for, any work involving a risk or danger to the employees or the public to "use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices." ORS 654.305.

Under this statute, the circumstances under which one person may have some duty of care with regard to another person are enlarged over those prevailing under the general maritime law. More important, the standard of care which must be met in fulfilling such duty is greatly increased over what it would be under general maritime law.

Appellant has acknowledged that the standard of care required under the Liability Law is higher than under the general maritime law, where, as here, the doctrine of unseaworthiness has no application. The

supreme court of Oregon has also so held.⁶ That court has also expressly held that, where the rights of the parties are to be determined by the maritime law, the provisions of the Liability Law are not applicable. *Hawkins v. Anderson & Crowe*, 84 Ore. 94, 164 Pac. 556, 558.⁷

Appellant points out that, with respect to defenses, the Liability Law is closer to the general maritime law than is the common law, which would be applied under the Oregon Wrongful Death Act.⁸ What is lost sight of, however, is that, under the general maritime law, appellant could not even get into court, because an action for wrongful death will not lie.

The courts have come to the aid of the plaintiff in this circumstance to the extent of making available a state wrongful death statute. Under that statute, however, a defendant is chargeable with no greater standard of care than would be the case under the maritime law, and he gains the benefit of the more effective defenses

⁶*Hoffman v. Broadway Hazelwood*, 139 Ore. 519, 10 P.2d 349, 11 P.2d 814; *Fromme v. Lang & Co.*, 131 Ore. 501, 281 Pac. 120.

⁷See, also, *Sanderson v. Sause Bros. Ocean Towing Co.*, 114 F.Supp. 849. Contra, *Keithley v. North Pacific SS Co. (D. Ct.)* 232 Fed. 255.

⁸Appellant draws this comparison between the defenses which are available:

Incident	Common Law	Maritime Law	Employers' Liability Law
Contributory negligence	Complete Defense	Mitigation of damages	Mitigation of damages
Assumption of risk	Complete Defense	Mitigation of damages	No defense
Negligence of fellow servant	Complete Defense	No defense	No defense

of the common law. See 1 Benedict on Admiralty, 6th ed., 392, § 148. On balance, this is held to produce a result which does not work material prejudice to the characteristic features of the general maritime law.

What appellant is asking for, however, would upset this balance in two particulars. While gaining, as in the case of the Wrongful Death Act, an avenue of relief not available in admiralty, he would also (1) benefit from an increase in the standard of care which the Liability Law would place upon appellee, and (2) escape the more effective defenses which he would have to meet were the Wrongful Death Act being applied. In our view, the result would be an unconstitutional displacement of the essential features of general maritime law.

We therefore conclude that the trial court did not err in holding that the Liability Law could not be constitutionally applied in this case.⁹

The final question presented is whether the trial court erred in determining that appellant was not entitled to recover under the Oregon Wrongful Death Act because negligence had not been proved.

In questioning this determination, appellant does not attempt to charge the United States with negligence, if any, of the independent contractor. It argues, however, that the United States is here in the same position that an owner of premises would be with respect to employees of an independent contractor engaged in work on the

⁹It is unnecessary for us to consider whether the trial court was also correct in ruling that, if that act were applied, the United States would not be liable thereunder because it was not responsible for the work being performed by the decedent.

premises. Contending that Government personnel must have been aware of the hazards of navigating the tug and barge in bay 9, under the conditions then existing, appellant asserts, in effect, that they should have decreased the hazard (presumably by closing additional gates in the area), or should have warned the contractor of the extreme danger.

We assume, for present purposes, that the United States owed a duty to decedent equivalent to that owed by an owner of premises to the employee of an independent contractor working on the premises. We also agree with appellant that, under the evidence, Government personnel charged with operating the dam were aware of the amount and velocity of water which was going through the spillway gates at the time of the accident. A finding of fact, if the trial court had made it, that Government personnel must have realized that the proposed sounding operation involved a certain amount of danger, would also be supportable.

But we find no basis in the record for the inference appellant wants us to make, that Government personnel "were aware of the limited power of the tug Muleduzer, and its inability to cope with the turbulent water in the spillway basin. . . ." Nor does the evidence warrant a finding appellant would have us make, that Government personnel knew, or should have known, that the contractor and his employees "did not fully appreciate the great danger created by the spillway gates immediately adjacent to bay 9 being permitted to remain open."

The record indicates that the contractor had more

information concerning the hazards to be met than did Government personnel. The amount and velocity of the flow through the spillway gates were known to him. The turbulence it created was open and apparent. In addition, the contractor knew the capabilities of his tug, and was familiar with the way it and the barge could be operated. He had also made a personal reconnaissance of the area on the previous day. With all of this information, he yet misjudged the danger. Government personnel, with less information, could not be expected to have a better appreciation of the danger.¹⁰

Dye v. United States, 6 Cir., 210 F.2d 123, cited by appellant, is inapposite. There, actions were brought to recover for the wrongful death of several persons who were drowned when their small boats were sucked by a strong current through an open wicket of a dam on the Ohio River. It was held that the United States was negligent in its failure to use protective measures for the benefit of navigators, and to give adequate warning of the dangerous condition at the dam to small boats navigating near it.

In the *Dye* case, the open wickets on the dam amounted to a latent hazard, not perceivable by members of the public boating upstream. In our case, however, the turbulent condition of the water was observable, and observed, by all. Here, in addition, the contractor had made an independent study of the haz-

¹⁰Had the contractor asked for the closure of more gates, this would presumably have been done. Had it not been done, the contractor could have declined to proceed. The sounding operation was not specifically required by the contract.

ards involved, and had satisfied himself that the work could be safely accomplished.

If it be assumed, however, that the negligence of Government personnel could be inferred from the evidence, it was not a necessary inference, and the trial court was not required to make it. As stated in *United States v. Marshall*, 9 Cir., 230 F.2d 183, 187, "negligence is ordinarily a question of fact to be resolved by the trier of fact. [Citing cases.] It is only where the facts are undisputed *and* where but one reasonable conclusion can be drawn therefrom the negligence becomes a question of law."

Whether the determination of the trial court that there was no breach of common-law duty owing to decedent is viewed as a finding of fact or a conclusion of law, we hold that, in making that determination, the trial court did not err.

AFFIRMED.

(Endorsed:) Opinion. Filed Aug. 20, 1958.

Paul P. O'Brien, Clerk.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes involved.....	2
Statement.....	2
Argument.....	7
Conclusion.....	13
Appendix.....	14

CITATIONS

Cases:

<i>Eastern Air Lines v. Union Trust Co.</i> , 221 F. 2d 62, certiorari denied <i>sub nom. Union Trust Co. v. United States</i> , 350 U. S. 911.....	10
<i>Fromme v. Lang & Co.</i> , 131 Ore. 501.....	11
<i>Grant Smith-Porter Co. v. Rohde</i> , 257 U. S. 469.....	11
<i>Great Lakes Dredge & Dock Co. v. Kierejewski</i> , 261 U. S. 479.....	11
<i>Hawkins v. Anderson & Crowe, Inc.</i> , 84 Ore. 94.....	12
<i>Hoffman v. Broadway Hazelwood</i> , 139 Ore. 519.....	11
<i>Indian Towing Co. v. United States</i> , 350 U. S. 61.....	9
<i>Jacob v. New York City</i> , 315 U. S. 752.....	11
<i>Jeffries v. DeHart</i> , 102 Fed. 765.....	11
<i>Joseph B. Thomas, The</i> , 86 Fed. 658.....	11
<i>Knickerbocker Ice Co. v. Stewart</i> , 253 U. S. 149.....	11
<i>Lawton v. Morgan, Fliedner v. Boyce</i> , 66 Ore. 292.....	13
<i>Lottawanna, The</i> , 21 Wall. 558.....	8, 10
<i>Messel v. Foundation Co.</i> , 274 U. S. 427.....	11
<i>Minnie v. Port Huron Terminal Co.</i> , 295 U. S. 647.....	11
<i>Moran v. United States</i> , 102 F. Supp. 275.....	9
<i>Payne v. Jacksonville Forwarding Co.</i> , 290 Fed. 936.....	12
<i>Plymouth, The</i> , 3 Wall. 20.....	8
<i>Pope & Talbot, Inc. v. Hawn</i> , 346 U. S. 406.....	11
<i>Robbins Dry Dock Co. v. Bahl</i> , 266 U. S. 449.....	12
<i>Russell, Poling & Co. v. United States</i> , 140 F. Supp. 890.....	9

Cases—Continued

<i>Sanderson v. Sause Bros. Ocean Towing Co.</i> , 114 F. Supp. 849	Page 11
<i>Schuede v. Zenith S. S. Co.</i> , 216 Fed. 566	12
<i>Somerset Seafood Co. v. United States</i> , 193 F. 2d 631	9
<i>Southern Pacific Co. v. Jensen</i> , 244 U. S. 205	11
<i>State Road Department v. United States</i> , 78 F. Supp. 278	9
<i>Tamm v. Sauset</i> , 67 Ore. 292	13
<i>Turner v. Wilson Line</i> , 142 F. Supp. 264	12
<i>Western Fuel Co. v. Garcia</i> , 257 U. S. 233	11
<i>Warner v. Symmes, et al.</i> , 114 Ore. 451	13
<i>Young v. Clyde S. S. Co.</i> , 294 Fed. 549	12

Statutes:

Federal Tort Claims Act:	
28 U. S. C. 1346 (b)	2, 9, 14
28 U. S. C. 2674	2, 9, 14
Oregon Employers' Liability Law (ORS 654.305-654.335)	2, 7, 8, 10, 11, 12, 13, 14-18
Oregon Wrongful Death Statute, ORS 30.020	2, 6, 7, 18

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 438

HENRY L. HESS, JR., ADMINISTRATOR OF THE ESTATE OF
GEORGE WILLIAM GRAHAM, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon (R. 47-48) is reported at 1958 A. M. C. 660. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. 11-28) is not as yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1958 (R. 257). The petition for writ of certiorari was filed on October 13, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Government's liability under the Federal Tort Claims Act for an injury on Oregon navigable waters allegedly caused by the operation of a Government dam is governed by the general maritime law, as would an action between private parties in an Oregon state court.

2. Whether the Oregon Employers' Liability Law is applicable to an action on a maritime tort.

3. Whether the district court correctly held that the Oregon Employers' Liability Law was by its terms inapplicable to the facts of this case.

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act (28 U. S. C. 1346 (b) and 2674), the Oregon Employers' Liability Law (ORS 654.305-654.335), and the Oregon Wrongful Death Statute (ORS 30.020) are set forth in the Appendix, *infra*, pp. 14-18.

STATEMENT

This action was instituted by petitioner against the United States, under the Federal Tort Claims Act, to recover damages for the death of petitioner's decedent, George William Graham, a carpenter foreman engaged in work connected with a contract between his employer and the United States.

1. *The undisputed facts.*¹—On June 23, 1954, decedent's employer, Robert C. Larson, doing business as the Larson Construction Company, entered into a

¹ Nearly all of the evidentiary facts were stipulated (R. 34-46).

contract with the Corps of Engineers of the United States Army for the repair of the Bonneville Dam, a Government-owned facility on the Columbia River (R. 49-51). This facility includes a powerhouse between the Oregon shore and Bradford Island, and a spillway dam between Bradford Island and the Washington shore. The dam contains eighteen bays, numbered from the fishway bay on the Washington shore (Bay 1) to the fishway bay of Bradford Island (Bay 18) (R. 50). Each bay has a movable gate which is opened and closed vertically (R. 50). On the downstream side of the dam is a concrete structure called a baffle deck. It is dotted with concrete blocks called baffles, which serve to dissipate the energy and velocity of the water discharged through the dam (R. 50-51).

The contract between Larson and the United States called for the restoration of these baffles, which had been eroded by water, and for the construction of a temporary cofferdam to permit the restoration work to be done (R. 149). Larson was required by the contract to furnish all necessary materials, labor, and equipment (R. 51). Construction of the cofferdam was to begin while water was being necessarily discharged through the spillway, until the flow of the river had receded to a point where the entire flow could be handled through the power station (R. 51). Larson was to inform the Government of all proposed action on his part which would have an effect upon the operation of the spillway dam (R. 51).

On August 13, 1954, Larson was notified that the level of the river was such that, under the contract, he

was to start work within ten days (R. 52). On the same day he conferred with Albert M. Capps, the superintendent in charge of the Bonneville Dam, about the closing of a number of the gates in order to facilitate the construction of the cofferdam. As a result, the gates in Bays 11-17 were immediately closed (R. 52). Between August 16 and August 20, 1954, the Government construction project engineer, Patrick S. Leonti, conferred with Larson (R. 53). Leonti informed Larson that requests to close additional gates should be directed to him and that he would then relay those requests to the appropriate operational personnel (R. 53).

According to the contract, a part of the cofferdam was to consist of a timber crib in Bay 9 resting on the top of the "ogee" curve—the upper line of the permanently submerged part of the dam (R. 50)—and running at right angles to the face of the dam (R. 53). The contract drawing reflected the cross-section of the ogee as originally constructed, but Larson believed it might subsequently have become eroded and decided to take soundings to establish its true cross-section. The contract did not require or refer to the taking of soundings (R. 53-54).

On August 18, 1954, Larson requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 P. M. on August 20, in order to facilitate the taking of soundings (R. 54). Leonti forwarded the request to the operations division of the dam and it was fulfilled (R. 54). On the basis of a reconnaissance trip by his superintendent on August 19, and his own personal observations of the situation, Larson determined for

himself that the soundings could be safely accomplished according to the plan he had devised (R. 55). He did not seek the advice of the Government on the matter and at no time was there a request that any additional gates be closed (R. 54, 55).

On August 20, the tug MULEDUZER set out from the Bradford Island shore pushing a barge which was fastened to the tug by four steel lines (R. 55-56). Both the tug and the barge were owned by Larson (R. 55). Aboard them were the decedent and five other Larson employees, one of whom was in sole charge of the operation (R. 55). All of the personnel and equipment involved were selected by Larson himself (R. 55).

The tug and barge headed downstream for some distance and then proceeded upstream towards Bay 9 (R. 56). As the barge reached Bay 9 it veered in a northerly direction and its port bow struck a pier between Bays 8 and 9 (R. 56). The bow was stoved in, and, as water rushed in through the hole, the barge was driven in front of Bay 8 and the other open bays. The barge and tug were swamped and sunk. Five of the six men aboard, including the decedent, were drowned.

2. *Proceedings in the courts below.*—On April 18, 1955, this suit was brought under the Tort Claims Act (R. 3). On March 29, 1957, following a full trial, the district court rendered an opinion in which it concluded that the United States was not liable (R. 47-48). The court ruled that petitioner had not established that the Government was negligent "in any respect" and that, therefore, he was not entitled to

recovery under the Oregon Wrongful Death Statute (*infra*, p. 18). The court further held that the Oregon Employers' Liability Law (*infra*, pp. 14-18) was inapplicable because (1) the Government was not responsible for the work being performed by Larson and, therefore, by its terms the Law was inapplicable; and (2) the high standard of care imposed by the Law may not constitutionally be applied to actions involving torts consummated on navigable waters and governed by the maritime law.

On May 9, 1957, the court supplemented its opinion with findings of fact and conclusions of law (R. 48-62). In addition to the undisputed facts, the court found that (1) the immediate cause of the accident was the turbulent condition of the water in the spillway; (2) this condition was open, apparent, and obvious to Larson, the tugboat operator, and his other employees; (3) the difference in the elevation of the water in front of the open gates of the spillway dam and that in front of the closed gates was also visible and obvious; (4) Larson was an independent contractor and had not operated under the supervision, control, or direction of the United States; (5) the Government had no control over the details, manner, or method by which the work under the contract was to be accomplished but was interested only in insuring a general result in conformity with the contract and had retained a right to inspect the work during its progress to determine whether this result was being obtained; (6) Larson had determined for himself the method, manner, and means by which the sounding operation would be carried out and no employee of

the United States participated in the operation or gave Larson or any of his employees direction or orders with respect thereto; (7) no employee of the Government had been engaged in the sounding operation and there had been no intermingling of the employees of the United States with those of Larson in connection with the work being performed at the time of Graham's death; and (8) the Government was not in charge of, responsible for, or engaged in the work being performed by Larson which resulted in the accident (R. 56-59). In accordance with the court's findings and conclusions of law, judgment was entered for the United States (R. 62-63).

The court of appeals affirmed. It held that, since the accident occurred on navigable waters, the applicable law of Oregon—the place where the act or omission occurred—was the general maritime law. It further held that the Oregon Employers' Liability Law was inconsistent with the maritime law and thus would not be applied by the Oregon courts in the circumstances of the case. Finally, the court determined that the findings of the district court relating to the negligence of the Government were supported by the evidence and that, therefore, liability could not be imposed under the Oregon Wrongful Death Statute.

ARGUMENT

Petitioner does not challenge the findings below that the United States was not liable under the standards of the general maritime law as supplemented by the Oregon Wrongful Death Statute. His sole claim

here is that the cause of action was governed by the Oregon Employers' Liability Law, which provides in part (§ 654.305, *infra*, pp. 14-15):

Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

Petitioner contends that the Liability Law applies either (1) because the action is not governed by maritime law or (2) because the Liability Law is a permissible supplement to the maritime law even if the latter does govern. Neither contention is sound. In addition, the district court's finding that the United States was not "responsible" for the work would preclude recovery under the Liability Law even if it otherwise applied.

1. The only argument discussed by petitioner as a reason for granting the writ is his contention that the cause of action is not governed by maritime law. Petitioner does not dispute that, since the injury occurred on the navigable waters of the United States, an Oregon state court would of necessity apply the general maritime law to a similar action between private parties. See *The Plymouth*, 3 Wall. 20, 35-36; *The Lottawanna*, 21 Wall. 558, 575. Actions under

the Federal Tort Claims Act are, in turn, governed by "the law of the place where the act or omission occurred." 28 U. S. C. 1346 (b), *infra*, p. 14. The purpose was to make the United States liable to the same extent that a private person would be in like circumstances. 28 U. S. C. 2674, *infra*, p. 14; see *Indian Towing Co. v. United States*, 350 U. S. 61, 68. Since all of the acts or omissions alleged, as well as the injury, occurred in Oregon, it would seem to be beyond dispute that the action is to be governed by the law that would be applied by an Oregon court to these facts—*i. e.*, the general maritime law.²

Petitioner contends, however, that the "place" where the alleged omission occurred was on land (*i. e.*, the dam itself, which petitioner contends is an extension of "land") and hence that the proper reference under the Tort Claims Act is to the law governing torts occurring on land rather than torts occurring on navigable waters. Petitioner's premise is that the Tort Claims Act's reference to "the law of the place where the act or omission occurred" is a reference to a particular state substantive rule applicable to the specific locality or type of terrain on which the act occurred. The contention is insubstantial. Patently, the Act's choice-of-laws provision is no more than a typical conflicts rule specifying the

² For Federal Tort Claims Act cases applying general maritime principles under this theory, see *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (C. A. 4); *Russell, Poling & Co. v. United States*, 140 F. Supp. 890, 892 (S. D. N. Y.); *State Road Department v. United States*, 78 F. Supp. 278, 280 (N. D. Fla.); *Moran v. United States* 102 F. Supp. 275, 278-279 (D. Conn.).

jurisdiction (normally a state) whose laws shall govern the action. Since only political entities have laws (certainly dams do not), "the law of the place" can mean nothing else. And once the reference has been made to the appropriate state, the determination of the substantive rule applicable to the particular transaction is a question of state law, limited, as here, by the state's obligation to follow the maritime law.

Eastern Air Lines v. Union Trust Co., 221 F. 2d 62 (C. A. D. C.), certiorari denied *sub nom. Union Trust Co. v. United States*, 350 U. S. 911, relied upon by petitioner, held only that the action was governed by the law of the place where the negligent acts occurred (Virginia) rather than that of the place of the injury (District of Columbia). That was a choice simply of the jurisdiction to whose laws reference should be made and in no way conflicts with the instant case, where all the relevant events occurred in Oregon and it is agreed by all that Oregon law is controlling.

2. Petitioner renews, but does not discuss, his alternative contention below that, even if the action is governed by the maritime law, the Oregon Employers' Liability Law may be applied as a supplement to that law. Since petitioner does not urge that question—turning as it does upon an appraisal of the inconsistencies between the maritime law and the particular state statute—as a reason for granting the writ, it need be only briefly considered.

It is now settled that the considerations in favor of a uniform national maritime law (see *The Lottawanna*, *supra*) prohibit resort to state statutes "which

work material prejudice to the characteristic features of the general maritime law.” *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216.³ The Oregon Employers’ Liability Law has been held to, and manifestly does, fall in that category. *Sanderson v. Sause Bros. Ocean Towing Co.*, 114 F. Supp. 849 (D. Ore.). It requires an employer to use every practicable safety “device, care and precaution”, regardless of cost or any test of reasonableness, and is thus a radical departure from the traditional standard of due care.⁴ See, e. g., *Fromme v. Lang & Co.*, 131 Ore. 501, 504-505; *Hoffman v. Broadway Hazelwood*, 139 Ore. 519. That it is even more drastic in the scope of the persons made subject to that duty is shown by this very case: if the terms of the Liability Law would apply here, as petitioner claims, then it is clear that the Law has imposed upon property owners entirely new duties to the employees of an independent contractor.

³ See also, to the same effect: *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479; *Messel v. Foundation Co.*, 274 U. S. 427, 434; *Minnie v. Port Huron Terminal Co.*, 295 U. S. 647; *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406.

State wrongful death statutes which simply provide a remedy for a recognized common-law liability may, on the other hand, be applied in admiralty, since they work no prejudice to its characteristic features. *Western Fuel Co. v. Garcia*, 257 U. S. 233, 240. It has also been held that the maritime law is not controlling where the plaintiff’s employment and activities at the time of injury have no direct relationship to navigation or commerce and are matters of merely local concern. *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 476.

⁴ Liability for negligence under the maritime law is, of course, measured by the reasonable care standard. E. g., *Jacob v. New York City*, 315 U. S. 752; *The Joseph B. Thomas*, 86 Fed. 658 (C. A. 9); *Jeffries v. DeHart*, 102 Fed. 765 (C. A. 3).

In *Robbins Dry Dock Co. v. Dahl*, 266 U. S. 449, this Court held that the New York Labor Law, which similarly departs from the reasonable care standard, could not be applied in an action on a maritime tort. See also, to the same effect, *Schuede v. Zenith S. S. Co.*, 216 Fed. 566 (N. D. Ohio) (Ohio Employers' Liability Act); *Payne v. Jacksonville Forwarding Co.*, 290 Fed. 936, 938 (C. A. 5) (Florida Hazardous Employment Act); *Young v. Clyde S. S. Co.*, 294 Fed. 549, 550-551 (S. D. Fla.) (same); *Turner v. Wilson Line*, 142 F. Supp. 264 (D. Mass.) ("punitive" Massachusetts Death Statute). And in *Hawkins v. Anderson & Crowe, Inc.*, 84 Ore. 94, 101, the Oregon Supreme Court stated with reference to the Employers' Liability Law itself:

It may be that the rights of the parties are to be determined by the maritime law: *Schuede v. Zenith Steamship Co.* (D. C.), 216 Fed. 566. If so, the provisions of the Employers' Liability Law * * * are certainly not applicable.

3. In all events, it is clear, as the district court held (R. 47),⁵ that petitioner has not established a right to recover under the Employers' Liability Law even if that Law is applicable. The district court expressly found that the United States "was not in charge of, responsible for or engaged in the work being performed by the independent contractor which resulted in the fatal accident" (R. 59). That finding is fully supported by the evidence (see the Statement, *supra*, pp. 2-5) and the court's subsidiary findings (*c. g.*, R.

⁵ The court of appeals found it unnecessary to reach this question.

57-59) and is a correct application of the Oregon law as interpreted by the Oregon Supreme Court. As that court observed in rejecting a similar claim under the Employers' Liability Act (*Wärner v. Synnes, et al.*, 114 Ore. 451, 458):

It is well settled in this jurisdiction that where the work is in charge of a contractor and the party with whom he contracts is concerned only in the general result of the work and has no control of the details and manner in which the work shall be accomplished the contractor alone is responsible to the person in his employ who is injured during the progress of the work.
* * * The reason * * * is that the owner is not the person in charge of the work and so is not responsible for the injury complained of.

See also *Laurton v. Morgan, Fliedner & Boyce*, 66 Ore. 292; *Tamm v. Sauset*, 67 Ore. 292.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,

Solicitor General.

GEORGE COCHRAN DOUB

Assistant Attorney General.

ALAN S. ROSENTHAL

WILLIAM E. MULLIN, JR.

Attorneys.

NOVEMBER 1958.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U. S. C. 1346 (b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * *

2. The Oregon Employers' Liability Law provides as follows (Ore. Rev. Stat.):

654.305 *Protection and safety of persons in hazardous employment generally. Generally,*

all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

654.310 *Protective measures to be observed regarding certain machines, equipment and devices which are dangerous to employes.* All owners, contractors, subcontractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6). All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power.

(7). In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employes of the owner, contractor or subcontractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

654.315 *Persons in charge of work to see that ORS 654.305 to 654.335 is complied with.* The owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

654.320 *Who considered agent of owner.* The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

654.325 *Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs, and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

654.330 *Fellow servant's negligence as defense.* In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

654.335 *Contributory negligence.* The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

3. The Oregon Wrongful Death Statute provides as follows (Ore. Rev. Stat.):

30.020 *Action by personal representative for wrongful death.* When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased.

LIBRARY

SUPREME COURT, U. S.

Office Supreme Court, U.S.

AUG 8 1959

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

October Term, 1959

No. 5

HENRY L. HESS, JR., Administrator of the Estate of
George William Graham, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE PETITIONER

CLEVELAND C. CORY,
GEORGE H. FRASER,
CLAYTON HESS,

1410 Yeon Building,
Portland 4, Oregon,

Counsel for Petitioner.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
Statement of the Case	3
The Findings of Fact	6
Summary of Argument	14
Argument	16
I. 28 United States Code 1346(b) Required the Courts Below to Apply the Cause of Action for Wrongful Death Created by the Oregon Em- ployers' Liability Law, Notwithstanding that the Death Occurred on Navigable Waters	16
II. Recent Decisions of this Court Demonstrate that the Cause of Action for Wrongful Death Created by the Oregon Employers' Liability Law was Applicable Herein under Oregon Law as a Permissible Modification and Supplemen- tation to General Maritime Law	22
Conclusion	41
Appendix	43

TABLE OF CASES

	Page
Atkinson v. State Tax Commission, 156 Or. 461, 62 P.(2d) 13, 67 P.(2d) 161, aff'd. 303 U.S. 21	30
Byers v. Hardy, 68 Or. Adv. Sh. 557, 337 P.(2d) 806	32, 34, 35
C. D. Johnson Lbr. Co. v. Hutchens, 194 F.(2d) 574 (CA9)	33
62 Cases of Jam etc. v. United States, 340 U.S. 593	22
Clayton v. Enterprise Electric Co., 82 Or. 149, 161 P. 411	38
Coomer v. Supple Investment Co., 128 Or. 224, 274 P. 302	34
Drefs v. Holman Transfer Co., 130 Or. 452, 280 P. 505	33, 34
Dye v. United States, 210 F.(2d) 123 (CA6)	20
Eastern Air Lines v. Union Trust Company, 221 F.(2d) 62 (CA DC), cert. den. sub nom. Union Trust Co. v. United States, 350 U.S. 911	5, 18
Flemming v. Florida Citrus Exchange, 358 U.S. 153	22
Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272	3, 6, 14, 21, 23, 26
Hansen v. Hayes, 175 Or. 358, 154 P.(2d) 202	24
Knecht v. United States, 242 F.(2d) 929 (CA3)	19
Kunkel v. United States, 140 F. Supp. 591 (S.D. Cal.)	20
Martinson v. State Industrial Accident Commission, 154 Or. 423, 60 P.(2d) 972	29
McKay v. Pacific Building Materials Co. et al., 156 Or. 578, 68 P.(2d) 127	32, 34
Miller's Indemnity Underwriters v. Braud, 270 U.S. 59	28

TABLE OF CASES (Cont.)

Page

Myers v. Staub, 201 Or. 663, 272 P.(2d) 203	34, 35, 36, 38
Pacific States Lumber Co. v. Bargar, 10 F.(2d) 335 (CA9)	31
Pennsylvania Water & Power Co. v. Federal Power Commission, 123 F.(2d) 155 (CA DC), cert. den. 315 U.S. 806	19
Piukkula v. Pillsbury Flouring Co., 150 Or. 304, 42 P.(2d) 921, 44 P.(2d) 162	24
Rayonier Incorporated v. United States, 352 U.S. 315	41
Rorvik v. North Pacific Lumber Co., 99 Or. 58, 190 P. 331, 195 P. 163	33, 34
Sanderson v. Sause Bros. Ocean Towing Co., 114 F. Supp. 849 (D.C. Or.)	4
Southern Pacific Co. v. Jensen, 244 U.S. 205	4, 22
State Industrial Board of N.Y. v. Terry & Tench Company, 273 U.S. 639	29
Tamm v. Sauset, 67 Or. 292, 135 P. 868	36
The Vessel M/V Tungus v. Skovgaard, 358 U.S. 588	3, 6, 14, 23, 31
United States v. Marshall, 230 F.(2d) 183 (CA9)	5, 21
United States v. Matson Navigation Co., 201 F.(2d) 610 (CA9)	20
United States v. The Panoil, 266 U.S. 433	19, 30
Walters v. Dock Commission, 126 Or. 487, 266 P. 634, 270 P. 778	32, 36, 38
Warner v. Synnes, 114 Or. 451, 230 P. 362, 235 P. 505	36

TABLE OF CASES (Cont.)

Page

STATUTES

Oregon Revised Statutes

§ 30.020	4
§ 654.305 - 654.335	2, 16, 31
§ 654.325	4, 16, 17, 24

28 United States Code

§ 1254(1)	2
§ 1346(b)	2, 5, 22
§ 2671	2
§ 2674	2

MISCELLANEOUS

72 Harv. Law Rev. 1363	26, 31
------------------------	--------

In the Supreme Court of the United States

October Term, 1959

No. 5

HENRY L. HESS, JR., Administrator of the Estate of
George William Graham, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

--- **BRIEF FOR THE PETITIONER** ---

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon is reported at 1958 AMC 660 (also R. 47-48). The opinion of the Court of Appeals is reported at 259 F.(2d) 285 (also R. 241-255).

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1958 (R. 255). The petition for a writ

of certiorari was filed on October 13, 1958, and was granted on March 2, 1959 (R. 256). The jurisdiction of this Court is founded upon 28 United States Code, Section 1254(1).

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act (28 United States Code, Sections 1346(b), 2671 and 2674) and the Oregon Employers' Liability Law (ORS 654.305-654.335) are set forth in the appendix *infra*, pages 43-47.

QUESTIONS PRESENTED

1. In a Federal Tort Claims Act death action to recover damages on account of the drowning of petitioner's decedent on the navigable waters of the Columbia River within the State of Oregon, where respondent's liability was predicated upon the failure of its employees on Bonneville Dam, a shore structure, to regulate properly the flow of water through the spillway gates, were the courts below bound to apply the statutory law of Oregon applicable to non-maritime torts in view of the Tort Claims Act (28 U.S.C. § 1346 (b)) which measures respondent's liability "in accordance with the law of the place where the [negligent] act or omission occurred"?

2. Assuming *arguendo* that the courts below were correct in ruling that the Oregon law relating to maritime torts should govern, does not this Court's decision in

Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272, compel the conclusion that the right of action for wrongful death created by the Oregon Employers' Liability Law should apply to this "twilight zone" case, where the decedent's drowning occurred in an operation which, although maritime in nature, was so "local" that his beneficiaries were awarded compensation under the Oregon Workmen's Compensation Act?

3. Assuming *arguendo* that the courts below were correct in ruling that the Oregon law relating to maritime torts should govern, does not the right of action for wrongful death created by the Oregon Employers' Liability Law constitute a permissible modification and supplementation of general maritime law so as to be applicable herein, according to this Court's decision in *The Vessel M/V Tungus v. Skovgaard*, 358 U.S. 588?

STATEMENT OF THE CASE

This civil action to recover \$100,000 general damages and \$941.65 special damages was instituted in the Oregon federal court under the Federal Tort Claims Act to recover for the death of petitioner's decedent, George W. Graham, a carpenter foreman, who was drowned in the Columbia River on August 20, 1954, while engaged in work under a contract between his employer and the United States covering the construction of a cofferdam and restoration of the spillway deck of the Bonneville Dam.

This case was consolidated in the trial court with similar actions brought on account of the deaths of

fellow-employees Leonard L. Boylan, a carpenter foreman, and Merle L. Tobias, a civil engineer (R. 21-22). Pursuant to stipulation and order of the Court of Appeals, appeals in these other cases have been stayed pursuant to the agreement of all parties to be bound by the instant case.

In the trial court, petitioner based respondent's liability both upon the general Oregon wrongful death statute which limits liability to \$20,000 (ORS 30.020), and upon the statutory cause of action for wrongful death created under the Oregon Employers' Liability Law which contains no such statutory limit (ORS 654.325), it being petitioner's theory that in its exercise of its exclusive control over the operation of Bonneville Dam, particularly in its regulation of the turbulence of the water through the closing of enough spillway gates so as to furnish a quiet pool in which to work, respondent failed to use every device, care and precaution which it was practicable to use for the protection and safety of decedent and his fellow employees (R. 6-8).

The trial court held that the Oregon Employers' Liability Law was not applicable and that the high standard of care required thereunder, if applied to this case, would be unconstitutional under the doctrine of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, and *Sanderson v. Sause Bros. Ocean Towing Co.*, 114 F. Supp. 849 (D.C. Or.) (R. 47-48, 61). Thus, the basis of the trial court's decision was that since the death occurred on navigable waters of Oregon, general maritime law governed, and that to apply the higher standard of

care prescribed by the Employers' Liability Law would work material prejudice to the uniformity of general maritime law. In so ruling, the district court purported to follow the law of the place where the accident and the resulting death occurred.

The Court of Appeals for the Ninth Circuit rejected petitioner's argument that general Oregon law applicable to non-maritime torts applied because of the directive of 28 U.S.C. 1346(b) that respondent's liability should be measured according to the "law of the place where the act or omission occurred," in view of the fact that the asserted negligent acts or omissions of the United States in controlling the spillway gates took place on the Bonneville Dam, an extension of the land.

The Court of Appeals, following its decision in *United States v. Marshall*, 230 F.(2d) 183, 187, held that 28 U.S.C. 1346(b) refers to the law of the place where the negligence became operative, directly causing injury, thus calling for the application of general maritime law. The court admitted that its view was "not in harmony with the result reached" by the Court of Appeals for the District of Columbia in *Eastern Air Lines v. Union Trust Company*, 221 F.(2d) 62, cert. den. 350 U.S. 911.

The appellate court further held that the word "place" referred to in the statute means the state in which the act or omission occurred, not a particular locality or kind of terrain. Therefore, in applying the law of a particular state, the court should include the state's conflicts of law rules and the state law to be

applied in determining whether an admiralty or non-admiralty case was presented.

Apart from this interpretation of the federal statute, the Court of Appeals also held that, because of the higher than common law standard of care prescribed by the Oregon Employers' Liability Law, its application to this case would result in an "unconstitutional displacement of the essential features of general maritime law."

After the petition for a writ of certiorari was filed herein, this Court decided the cases of *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, and *The Vessel M/V Tungus v. Skovgaard*, 358 U.S. 588, both of which establish that, apart from its interpretation of Section 1346(b), the Court of Appeals erred in holding that the Oregon Employers' Liability Law was not applicable herein.

THE FINDINGS OF FACT

The facts herein were contained in a statement of agreed facts in the pretrial order on segregated issues (R. 20-29), and were restated in a stipulation (R. 34-46) filed at the time of trial. Accordingly, petitioner has no substantial quarrel with the findings of fact made by the district court (R. 48-60), except insofar as certain findings of fact are, in reality, conclusions of law drawn by the trial court from the undisputed basic facts.

The basic findings of fact made by the district court are summarized as follows:

- a. On June 23, 1954, Robert C. Larson, dba Larson

Construction Company, the employer of decedent Graham, a carpenter foreman, entered into a contract with respondent (Ex. 3) for construction of a cofferdam and restoration of baffles on the south half of the spillway baffle deck of Bonneville Dam, which at all times was owned and under the control of respondent (R. 50-51).

b. The principal facilities of Bonneville Dam are a powerhouse, which lies between the Oregon shore of the Columbia River and Bradford Island, and a spillway dam, which lies between Bradford Island and the Washington shore of the Columbia River. The spillway dam contains 18 bays, in each of which there is a movable gate which is opened and closed by being lifted or lowered in a vertical direction. When shut, each gate rests upon the top of the ogee section, which is the upper line of the submerged stationary portion of the dam. On the bed of the Columbia River, extending downstream across the width of the dam, is a concrete structure called the baffle deck. The baffle deck is dotted with concrete blocks called baffles which serve to dissipate the energy of the water discharged through the dam and to reduce the downstream velocity. In the interval between the completion of the dam in 1938 and the summer of 1954, the baffle deck and baffles had been eroded by the flow of water (R. 50-51).

c. The contract contemplated that the construction of the cofferdam and restoration of the baffles would be carried on by Larson without interruption of normal power generation, and that the construction of the cofferdam would be commenced while water was being discharged through the spillway dam, until such time

as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse. The contract further contemplated that Larson would inform respondent of all steps he proposed to take which would affect the operation of the spillway dam. Under the contract Larson was to supply all equipment and all labor. The contract further contemplated that the operation of the dam, including the operation of the spillway dam gates, would be conducted by personnel of respondent (R. 51-52).

d. On July 14, 1954, respondent gave Larson notice to proceed with the performance of the contract, and, thereafter, Larson commenced preliminary marshaling of equipment and construction materials on the project site. On August 13, 1954, respondent notified Larson that the water level of the Columbia River was such that he was to commence construction work on the water no later than August 23, 1954.

e. On August 13, 1954, Larson personally conferred with respondent's employee Capps, who was project superintendent in charge of the operation of the dam, regarding the possibility of closing a number of gates of the spillway dam during preliminary construction work on the cofferdam. At that time it was found possible to close gates 11 through 17, that is, all the gates on the south half of the spillway dam from gate 11 southward towards the Bradford Island side, except the fishway gate. Gates 11 through 17 were closed on August 13, 1954, and remained closed up to and after the time of the accident (R. 52).

f. On August 16, 1954, respondent's employee Leonti, construction project engineer, arrived at the dam. Among his duties was the inspection of the project during the construction by Larson in order to ascertain that Larson was performing the contract in accordance with its terms. He also acted as liaison between Larson and those employees of respondent concerned with operation of the dam. Between August 16, 1954, and August 20, 1954, Leonti familiarized himself with the project and conferred with Larson and Larson's acting superintendent, Claterbos, as to Larson's plans for carrying out the project. Leonti informed Larson that any requests by Larson for closing the gates in the spillway dam should be made through him and that he would relay such requests to the employees of respondent charged with operating the dam and its gates (R. 53).

g. According to the contract plans and specifications, a part of the cofferdam was to consist of a timber crib which was to rest in bay 9 starting at the top of the ogee curve and running at right angles to the face of the dam. The crib was to rest on the curved slope and was to be built to fit that curve as nearly as possible. The contract drawing showed the cross section of the ogee as it had been originally constructed. Larson concluded that the ogee might have been eroded to some degree and that the cross section of the ogee might not still be the same as when originally constructed. He determined that it was necessary to take soundings of the ogee in bay 9 for the purpose of establishing its true cross section. The contract specifications did not require nor refer to the taking of soundings in the project area (R. 53-54).

h. On August 18, 1954, Larson's representative informed Leonti that Larson proposed to take soundings in bay 9 on August 20, 1954. Leonti was informed that Larson intended to take a tug and barge out on the water below the dam, to push the barge into bay 9 and to take soundings off the side of the barge. Larson or his representative requested Leonti to have the gates in bays 9 and 10 closed by 12:30 p. m. on August 20, 1954, to facilitate the sounding operation. Larson did not request any gates to be closed other than 9 and 10. Leonti forwarded the request to the operations division of the dam and by 12:30 of August 20, 1954, the gates in these bays had been closed, as well as gates 11 through 17. Larson sought no advice from respondent and respondent gave no advice as to the hazards of the proposed sounding operation (R. 54).

i. On August 19, 1954, Claterbos performed a reconnaissance run in another tugboat in the same area on the Columbia River in which the accident occurred for the purpose of determining whether the proposed sounding operation was safe. Based upon this reconnaissance run and personal observation, Larson determined for himself, without seeking respondent's advice or suggestions, that the proposed sounding operation was safe (R. 54-55).

j. Shortly before 2:00 p. m. on August 20, 1954, Larson's tug and barge set out from the Bradford Island shore of the river. The equipment and personnel utilized in the proposed sounding operation were selected solely by Larson. Decedent Graham, an employee of Larson, was aboard the tug as a member of the sounding

party. He had no control with respect to the manner in which the sounding operation was to be conducted. Larson's employee Tobias, a civil engineer, was in charge of the sounding operation (R. 55).

k. The tug pushed the barge, which was made fast to tug by four steel lines. When fastened together the tug and barge were in effect a unit. The tug and barge headed downstream from Bradford Island, came about in the middle of the river and headed upstream for bay 9. As the barge came to bay 9, it veered north and the port bow of the barge struck the pier between bay 9 and bay 8, stoving a hole in the bow of the barge. As water came in through the hole, the barge moved over in front of bay 8 and the other open bays north of bay 8. The tug and barge were swamped and sunk. All aboard the tug and barge were thrown into the water and drowned with the exception of a deck hand (R. 56).

l. The immediate cause of the accident and the decedent's death was the turbulent condition of the water which made it impossible to control the movements of the tug and barge and caused the barge to strike the pier. This turbulent condition in the spillway basin was open, apparent and obvious to all. The difference in elevation of the water in the turbulent area opposite the open gates as compared with the water in the spillway basin was also visible and obvious (R. 56-57).

m. At the time of the accident, gate 8 was open two dogs so that the height of the aperture between the top of the ogee and the bottom of the gate was 32 inches; gate 7 was open three dogs so that the height

of the aperture was 55 inches: gate 6 was open two dogs so that the height of the aperture was 32 inches high. These gates were all 50 feet wide and 50 feet high. The quantity of the water being discharged from these gates was approximately as follows: 5,700 cubic feet per second from gates 8 and 6, and 9,100 cubic feet per second from gate 7. At this time the elevation of the forebay in the spillway dam was about 73.5 feet and the elevation of the tailrace below the spillway dam was 18.6 feet. The elevation of the crest of the ogée at the spillway dam was about 24 feet, as measured from a fixed reference point at the dam. At the time of the accident, the flow of the Columbia River was 191,000 cubic feet per second. Of this flow 115,000 cubic feet per second was taken through the power house, 52,300 cubic feet per second was being discharged through the spillway dam, 3,000 cubic feet per second passed over the fishway, and 800 cubic feet per second was being ponded (R. 56-57).

n. The accident and the decedent's death occurred on navigable waters of the United States within the jurisdiction of the State of Oregon (R. 58).

o. Larson was an independent contractor and was not operating under the supervision, control and direction of respondent. Respondent was under no duty by virtue of the contract to provide Larson with any materials, equipment or personnel. Respondent had no control of the details, manner or method by which the work under the contract was to be accomplished, but was interested only in the general result in conformity with the specifications of the contract. Respondent retained a mere right to inspect Larson's work as it progressed.

in order to determine whether it was being completed in accordance with the plans and specifications (R. 58).

p. Larson selected his own equipment and personnel for the proposed sounding operation and determined for himself the method, manner and means by which it would be carried out. No employee of respondent participated in this operation or gave Larson or any of his employees any directions or orders concerning the sounding operation. There were no employees of respondent engaged in the sounding operation which resulted in the accident. There was no intermingling of respondent's employees with Larson's employees in connection with the work being performed at the time of the accident. Respondent was not in charge of, responsible for or engaged in the work being performed by Larson and his employees which resulted in the fatal accident. Larson's employee Tobias was the foreman in charge of and responsible for the particular work in which he and Larson's other employees were engaged at the time of the fatal accident (R. 58-59).

q. Although Larson was insured against liability for compensation under the Longshoremen's and Harbor Workers' Act, neither Larson nor the insurer had given notice to the Deputy Commissioner that such insurance was in force, and Larson had not otherwise secured the payment of such compensation. The statutory beneficiaries of petitioner's decedent, as well as those of the other decedents, applied for, were awarded and are presently receiving compensation under the Oregon Workmen's Compensation Act (R. 59-60).

SUMMARY OF ARGUMENT

1. In a Tort Claims Act case, the liability of the United States for the acts or omissions of its employees while acting in the scope of their employment is the same as that of a private person, in accordance with the law of the place where the acts or omissions occurred.

2. In the present case, respondent's liability is not governed by maritime law even though the death occurred on navigable waters. The alleged negligent acts and omissions occurred in connection with respondent's operation of the Bonneville Dam, which is merely an extension of the land. Therefore, the law of Oregon governing non-maritime torts applies.

3. Assuming *arguendo* that the court below correctly construed the Tort Claims Act, nevertheless, this Court's decision in *The Vessel M/V Tungus v. Skovgaard*, 358 U.S. 588, establishes that the entire cause of action for wrongful death created by the Oregon Employers' Liability Law may be applied to a death on territorial waters as a permissible modification and supplementation of general maritime law.

4. Assuming *arguendo* that the court below correctly construed the Tort Claims Act, nevertheless, this Court's decision in *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, has finalized Oregon law. The *Hahn* case establishes that the Oregon Employers' Liability Law may be applied in a maritime tort case as a permissible modification and supplementation of general maritime law where the worker's fatal injury occurred in an operation which was essentially "local", although maritime in nature.

5. Under the holdings in both the *Tungus* and *Hahn* cases, the Oregon Employers' Liability Law is applicable to this action.

6. Respondent was liable to petitioner's decedent under the Oregon Employers' Liability Law because (1) petitioner's decedent was employed by respondent's contractor; (2) in the course of his work under this contract, decedent was required to be in the vicinity of a hazardous condition under the control of respondent, and involving risk and danger; (3) respondent was an employer and there was a mutual economic benefit in the close relationship between respondent's employees and Larson, the employer of decedent; (4) respondent had exclusive control of the instrumentality whose operation caused the accident; and (5) it was contemplated by respondent and Larson that the said instrumentality would be actively operated and exclusively controlled by respondent during the course of the work.

7. The record establishes that respondent breached its statutory duty to petitioner's decedent under the Employers' Liability Law, and that this breach proximately caused the accident.

ARGUMENT

I

28 United States Code 1346(b) Required the Courts Below to Apply the Cause of Action for Wrongful Death Created by the Oregon Employers' Liability Law, Notwith- standing that the Death Occurred on Navigable Waters.

In the courts below, petitioner relied upon the Employers' Liability Law of Oregon (ORS 654.305 and ORS 654.325) which states in part:

"Protection and safety of persons in hazardous employment generally. Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

* * * * *

"Who may prosecute damage action for death; damages unlimited. If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to

maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named."

In connection with petitioner's right to the protection of this statute, the district court found that decedent was at the time of his death a resident of Washington, that no person entitled to bring this action as a named beneficiary under ORS 654.325 was a resident of the State of Oregon, and that petitioner, as general representative, was the proper person to bring the action for the purposes of ORS 654.325 (R. 48-49).

The complaint herein alleged the necessary elements of a cause of action under the Employers' Liability Law. It was claimed that in eight separate particulars respondent failed to use every device, care and precaution practicable to be used for the protection and safety of life and limb without impairing the efficiency of the dam operation (R. 6-8).

However, the courts below held that it would be unconstitutional to apply the Employers' Liability Law. The basis of their decision was that since the death occurred on navigable waters of Oregon general maritime law governed, and that to apply the higher standard of care prescribed by the Employers' Liability Law would work material prejudice to the uniformity of general maritime law. In so ruling, the courts purported to follow the law of the place where the accident and the resulting death occurred.

However, recent decisions make it clear that Congress changed the general conflicts of law rule for Tort

Claims Act cases, and substituted the law of the place where the negligent United States employee's act or omission occurred.

In *Eastern Air Lines v. Union Trust Company*, 221 F.(2d) 62 (CA DC), cert. den. sub nom. *Union Trust Co. v. United States*, 350 U.S. 911, the United States was sued in a Tort Claims Act case for the death of air-line passengers who lost their lives in an accident which occurred over the Potomac River which is in the District of Columbia (221 F.(2d) at p. 80, note 17). Liability was predicated upon negligent acts and omissions of airport tower operators employed by the United States. The tower was located in the State of Virginia. The Court of Appeals held that the Virginia law governed the liability of the United States. A judgment of \$150,000 was reduced to \$15,000 to meet the limitation imposed by the Virginia law governing wrongful death. Judge Miller, who dissented on this point, wrote (p. 80):

"The general conflicts rule disregards the law of the place of the negligent act or omission and, instead, uses the law of the place where the injury was sustained. My brothers Edgerton and Fahy are of the view that the trial court erred in applying the general rule here because the Tort Claims Act provides in § 1346(b) that

' * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for * * * death caused by the negligent or wrongful act or omission of any employee of the government * * * under circumstance where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.' (Emphasis supplied.)

"They hold that Congress thus provided in explicit terms for the Government's liability to be measured under the law of the place where its negligent employee's act or omission occurred, and that therefore the Act requires Virginia law to be applied in this case."

The *Eastern Air Lines* case was followed by the Court of Appeals for the Third Circuit in *Knecht v. United States*, 242 F.(2d) 929 (CA3), where Judge Goodrich stated that recovery in a Tort Claims Act case is governed by the law where the liability-creating conduct occurred.

The theory of this action is that the negligent acts and omissions of the respondent's employees did not occur on the Columbia River, but rather on land—on Bonneville Dam itself. Respondent's liability is predicated upon the failure of its employees to regulate the flow of water through the dam spillway so as to afford protection to Larson's employees in their ill-fated sounding operation. No negligent act or omission occurring on navigable waters was claimed.

Respondent's negligence in the operation of its dam was not a "maritime tort" within admiralty jurisdiction so as to be governed by general maritime law. It is well settled that a dam, like a pier, is nothing but an extension of the land. It is clearly not an "aid to navigation," but rather an obstruction to navigation. *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F.(2d) 155, 163 (CA DC), cert. den. 315 U.S. 806. On this point it is necessary to refer only to *United States v. The Panoil*, 266 U.S. 433, holding that a spur

dike extending 700 feet into the Mississippi River must be regarded as land, and not within admiralty jurisdiction. (Accord: *United States v. Matson Navigation Co.*, 201 F.(2d) 610 (CA9), holding that a Columbia River dike owned and maintained by the United States was an extension of the land.) Thus, general maritime law had no place in this action, and the courts below should have applied the statutes and decisions of Oregon.

The necessity of determining the government's liability in a Tort Claims Act case in accordance with the law of the place where the act or omission occurred, and the fact that "place," in a case such as this, means a locality and requires a choice between general maritime law and state law, is illustrated by the decision in *Kunkel v. United States*, 140 F. Supp. 591 (S.D. Cal.). In that case, an action was brought for wrongful death arising out of alleged negligence occurring on the high seas. In dismissing the complaint without prejudice, the court held that since "the place" where the act or omission occurred was the high seas, the only law applicable was the Death on the High Seas Act which prescribed a remedy only in admiralty.

An example of the correct choice of law in an action under the Tort Claims Act arising out the deaths on navigable waters of the United States due to the negligent operation of a government dam is found in *Dye v. United States*, 210 F.(2d) 123 (CA6), where the court applied Kentucky law, rather than general maritime law.

The court below admittedly gave a different con-

struction to the statutory phrase "in accordance with the law of the place where the act or omission occurred." Following its decision in *United States v. Marshall*, 230 F.(2d) 183 (CA9), it held that "these words mean the place where the negligence, either of act or omission, 'became operative, directly causing the injury and not places where the negligence existed but was then inoperative'" (259 F.(2d) at p. 290). The court reasoned that the word "place" means the state in which the act or omission occurred, not a particular locality or kind of terrain. Further, the Court of Appeals reasoned that the "law" of the state included the state's conflicts rules and the law to be applied in determining "whether an admiralty or non-admiralty case is presented." The court justified this interpretation on the ground that otherwise the United States might be put in a less favored position than a private individual defendant.

As shown hereafter, this Court in *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, upheld a maritime tort recovery based upon the Oregon Employers' Liability Law. Thus, the *Hahn* case establishes that the Court of Appeals erred in finding that if this action had been between private persons, Oregon or federal law would have precluded the application of the Employers' Liability Law.

In any event, the decision of the Court of Appeals contradicts the clear and plain wording of the statute. It would have been easy enough for Congress to have provided that the liability of the United States was to be appraised "in accordance with law of the state where the

[negligent] act or omission became operative." However, Congress employed different language. It is not the function of the courts to twist and torture a statutory phrase so as to distort its clear and plain meaning. As stated by Mr. Justice Frankfurter in *62 Cases of Jam etc. v. United States*, 340 U.S. 593, 596, and recently reiterated by Mr. Justice Brennan in *Flemming v. Florida Citrus Exchange*, 358 U.S. 153, 166:

"But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

II

Recent Decisions of this Court Demonstrate that the Cause of Action for Wrongful Death Created by the Oregon Employers' Liability Law was Applicable Herein under Oregon Law as a Permissible Modification and Supplementation to General Maritime Law.

Apart from rejecting the contention that Section 1346(b) of 28 United States Code requires the application of the Oregon Employers' Liability Law, the courts below ruled that under controlling Oregon law the Employers' Liability Law could not be given effect in an action to recover damages for a drowning on navigable waters. They both held, as a matter of law, that the doctrine of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, precluded application of this Oregon statute, because the application of a higher standard of care than liability for

ordinary negligence would result in "an unconstitutional displacement of the essential features of general maritime law" (R. 47, 259 F.(2d) at p. 292).

The recent decisions of this Court in *The Vessel M/V Tungus v. Skovgaard*, 358 U.S. 588, and *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, demonstrate, on two separate grounds, that the Oregon Employers' Liability Law constituted a permissible modification and supplementation to general maritime law and should be applied in this case.

FIRST: The *Tungus* case is a direct holding that the *Jensen* doctrine is not offended by the application of a local death statute where the death has occurred, as here, upon state territorial waters. More important, this Court held that a state death statute must be enforced in admiralty "as an integrated whole, with whatever conditions and limitations the creating State has attached" (358 U.S. at pp. 592-3):

"The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

In rejecting the contention that the application of liability under a state wrongful death statute to determine rights arising from a death in state territorial waters is destructive of the uniformity of federal maritime law, Mr. Justice Stewart wrote (358 U.S. at p. 594):

"Even *Southern P. Co. v. Jensen*, which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 US 205, at 216. It would be an anomaly to hold that a State may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. Cf. *Caldarola v. Eckert*, 332 US 155, 91 L ed 1968, 67 S Ct 1569."

It follows that the cause of action for wrongful death under the Employers' Liability Law (ORS 654.325), as created by the Oregon legislature¹, if otherwise applicable, must be applied in its entirety as "an integrated whole." The enforcement of a higher standard of care with respect to liability for death on Oregon territorial waters does not offend the doctrine of the uniformity of federal maritime law.

In any event, to apply any body of Oregon law to this case results in a disruption of the uniformity of maritime law to a certain extent. The application of the Oregon Wrongful Death Act brings into the general maritime law the complete defenses of contributory negligence, assumption of risk and negligence of a fellow servant. The incidents of the Employers' Liability Law are much closer to principles applied in admiralty courts, and its application leads to less disruption of "uni-

¹ ORS 654.325 is not a survival statute, but creates a new cause of action which accrues only upon the date of death *Piukkula v. Pillsbury Flouring Co.*, 150 Or. 304, 42 P.(2d) 921, 44 P.(2d) 162; *Hansen v. Hayes*, 175 Or. 358, 154 P.(2d) 202).

formity" than do the incidents of the Oregon Wrongful Death Act. A comparison of the legal relationships involved in the application of common law, maritime law and Employers' Liability Law shows that the greater kinship is between general maritime law and the Employers' Liability Law:

<i>Incident</i>	<i>Common Law</i>	<i>Maritime Law</i>	<i>Employers' Liability Law</i>
Contributory negligence	Complete defense	Mitigation of damages	Mitigation of damages
Assumption of risk	Complete defense	Mitigation of damages	No defense
Negligence of fellow servant	Complete defense	No defense	No defense
Degree of care	Ordinary care in circumstances	Ordinary care in the circumstances, or strict liability (unseaworthiness)	High care

In the instant case, the degree of care required would not greatly vary because ordinary care in the circumstances is a high degree of care.

The Court of Appeals rejected this argument on the ground that the benefit to a litigant in utilizing the Employers' Liability Law, rather than the Oregon Wrongful Death Act, resulted in an "unconstitutional displacement of the essential features of general maritime law" (259 F.(2d) at p. 292). However, as the above chart clearly shows, the characteristic features of general maritime law are consistent in every particular with the Employers' Liability Law of Oregon. How this affects a particular case is immaterial; the important criterion should be whether or not the incidents of the statutory cause of action are hostile to the characteristic features of general maritime law.

This appears to be the viewpoint of the commentator of the Harvard Law Review in reviewing this case (72 Harv. Law Rev. 1363, 1366):

"A difference in result, however, no matter how frequent or how extreme, does not appear to require rejection of a state statute which is not opposed to a principle of maritime law and the application of which would not produce undesirable disuniformity. If a statute has been enacted in substantially similar form in nearly all jurisdictions, little disuniformity would result from its application. In determining whether a less widely accepted statute may validly be applied, it seems that the severity and extent of the disparity which would be produced should be weighed against the policy behind the particular state law.

"The Supreme Court has tended in recent cases to allow the application of state law when it is in accord with enlightened developments but to reject state statutes which would impose outmoded restrictions. On the basis of such decisions it is arguable that the Employers' Liability Law, since in accord with the modern trend of employers' tort liability, should be a permissible supplement to the maritime law, even though, in earlier cases, similar statutes were held inapplicable."

SECOND: If the correct law to be applied in this Federal Tort Claims Act case be Oregon law, then the controlling Oregon decision is *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, reversing 66 Or. Adv. Sh. 117, 320 P.(2d) 668 (Ore. Sup. Ct.). That was an action for personal injuries brought under the Oregon Employers' Liability Law by an employee of Ross Island who was injured on a barge lying in navigable waters of the Willamette River at Portland, Oregon. Hahn was employed as an "oiler" on a dredge anchored to the shore.

The dredge was used to scoop sand and gravel from the bottom of a lagoon and dump it on a barge. He repaired the machinery on the dredge and operated a winch to move the barge into position. At the time of the accident, he was assisting in the transfer of a large hopper from one barge to another. While climbing a ladder attached to the hopper, the ladder separated from the hopper and fell upon him.

A jury verdict in Hahn's favor was set aside and judgment entered in the trial court on the ground that his sole remedy was under the Longshoremen's and Harbor Workers' Compensation Act. The Oregon Supreme Court affirmed the judgment.

This Court reversed and held that since Hahn's injury occurred in that "twilight zone" of Longshoremen's Act coverage in which an injured waterfront employee has an election to recover either under the federal or the state compensation law, the negligence action for damages permitted by the Oregon Workmen's Compensation statute was available to him, in view of the fact that his employer had elected to reject compensation coverage.

Thus, this Court has finalized the Oregon law and sustained liability under the Oregon Employers' Liability Law, even though the accident occurred on navigable waters. The Court further recognized that the application of both the Oregon Workmen's Compensation statute and the Employers' Liability Law was not precluded by *Southern Pacific Co. v. Jensen*, in a "twilight zone" case, where the worker's injury occurred in an operation which was "local," although maritime in nature.

Under the doctrine of the *Hahn* case, the older decisions of this Court must be examined to determine whether decedent's drowning occurred in an operation which, although maritime in nature, was essentially "local" in character. It is undisputed that petitioner's decedent was employed as a carpenter foreman (R. 21-22). He was a member of a sounding party sent by his employer to determine the true cross section of the ogee or curved slope of the submerged stationary portion of the dam (R. 50, 54, 55). The purpose of the soundings was to assemble data preliminary to the construction of a cofferdam (R. 53-54).

Thus, the decedent's employment and his employer's activities bore no direct relationship to navigation or commerce, but were purely of a local concern and confined to the repair and restoration work on the Bonneville Dam.

Two decisions of this Court are closely in point. In *Miller's Indemnity Underwriters v. Braud*, 270 U.S. 59, a judgment for benefits under Texas compensation statutes was affirmed on the ground that the claim arose out of a maritime tort, but that "the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law" (270 U.S. at pp. 64-65). There, the decedent was employed as a diver by a ship-building company. He submerged himself from a floating barge anchored in a navigable river for the purpose of sawing off the timbers of an abandoned set of ship launching ways. His death was caused by suffocation on account of a failure of air supply.

In *The State Industrial Board of N.Y. v. Terry & Tench Company*, 273 U.S. 639, this Court in a *per curiam* memorandum opinion, relying solely upon the *Braud* case, reversed the New York Court of Appeals' decision dismissing a claim for benefits under the New York compensation act. From the opinion of Cardozo, J. (240 N.Y. 292, 148 N.E. 527), it appears that the claimant was employed in the construction of a pier and was injured while standing on a floating raft in navigable waters.

Thus, the only difference between the claimant in the New York case and petitioner's decedent is that the New York claimant was injured in the construction of a pier, while this decedent was employed in the repair of a dam, both being extensions of the land.

Furthermore, the finding that Hahn's injury occurred in the "twilight zone" would appear to make the instant case *a fortiori* on that point. Hahn was on a barge which was loading interstate cargo, and the work he was doing at the time of his injury was practically the same work as performed by longshoremen. Many decisions hold that the loading of a barge is a purely maritime matter and not one of local concern (see cases collected in *Martinson v. State Industrial Accident Commission*, 154 Or. 423, 60 P.(2d) 972). On the other hand, petitioner's decedent, a carpenter foreman, had no duties pertaining to the tug and barge in which he was riding at the time of his death. His employment was non-maritime and the operation out of which the accident arose bore only the most remote or incidental relationship to navigation or commerce.

In this connection, the Court of Appeals fell into error in stating “. . . here it cannot be doubted that the activities in which decedent was engaged had a direct relation to navigation and commerce” (259 F.(2d) at footnote 4, pp. 289-290). In support of this statement, the court stated that the dam had been recognized “as an aid to navigation” by the Supreme Court of Oregon in *Atkinson v. State Tax Commission*, 156 Or. 461, 62 P.(2d) 13, 67 P.(2d) 161, aff’d 303 U.S. 21. The court also quoted the preamble of Section 1 of the Bonneville Project Act of August 20, 1937, 50 Stat. 731, 16 U.S.C. 832, which commences “For the purpose of improving navigation on the Columbia River and for other purposes incidental thereto . . .”

However, an examination of the *Atkinson* case, as well as the statutes authorizing the Bonneville Project, demonstrates that the so-called aid or improvement to navigation related to the construction of the locks and ship canal, as well as raising of the river level behind the dam. However, by its very nature, the dam itself is an obstruction rather than an aid to navigation. While such things as beacons and pile clusters have been termed aids to navigation since they are not connected with the land, a dike or a dam has never been considered to be in this category as far as admiralty jurisdiction is concerned. The mere fact that its presence affects the flow of the waters of the Columbia River and thereby ultimately facilitates navigation is not a sufficient basis on which to predicate a conclusion that a spillway dam repair project on the Bonneville Dam bears a direct relation to navigation and commerce (Cf. *United States v. The Panoil*, 266 U.S. 433, 434).

Finally, it is interesting to note that in the *Hahn* case this Court was of the opinion that Hahn's injury occurred in the "twilight zone" and that recovery for it could have validly been provided under the Oregon Workmen's Compensation Act. In the instant case, it is undisputed that pursuant to application the statutory beneficiaries of the decedent were awarded and are presently receiving compensation under the state compensation law (R. 59-60). This recognition of the "twilight zone" character of the accident by the Oregon authorities is entitled to be given weight by this Court (see *The Vessel M/V Tungus v. Skovgaard*, 358 U.S. 588, 590, footnote 4, and see discussion in 72 Harv. L. Rev. at pp. 1368-1369).

Of course, the question remains as to whether, under the findings of fact made by the district court, respondent breached a duty owed to petitioner's decedent under the provisions of the Employers' Liability Law of Oregon. Having held the law not to be applicable, the Court of Appeals deemed it unnecessary to determine whether respondent would be liable to petitioner, if the statute were applied (259 F.(2d) footnote 9, p. 292).

The Oregon statute applies to "... all owners, contractors and subcontractors and other persons having charge of, or responsible for, any work involving risk and danger to the employees" (ORS 654.305). It is settled Oregon law that the protection under the Act is afforded to employees of others as well as a person's own employees. The leading decision on this point is *Pacific States Lumber Co. v. Bargar*, 10 F.(2d) 335, 336 (CA9), where Judge McCamant held:

"The Oregon Employers' Liability Law is designed to protect employes. An action for damages under the statute will not lie at the instance of one who is not an employe carrying on his work at the place where he is injured. *Turnidge v. Thompson*, 89 Or. 637, 653, 175 P. 281; *Saylor v. Enterprise Electric Co.*, 106 Or. 421, 436, 212 P. 477. Every employer whose work involves risk or danger is required by the statute to take the required precautions, not only for the protection of his own employes, but also for the protection of employes of others whose duties bring them within reach of the dangers and risks of such work. The Supreme Court of Oregon has so construed the statute, and this construction is binding on the federal courts. *Clayton v. Enterprise Electric Co.*, 82 Or. 149, 161 P. 411; *Cauldwell v. Bingham & Shelley Co.*, 84 Or. 257, 155 P. 190, 163 P. 827; *Rorvik v. North Pacific Lumber Co.*, 99 Or. 58, 70, 190 P. 331, 195 P. 163."

The *Bargar* case was cited by the Oregon Supreme Court in *Walters v. Dock Commission*, 126 Or. 487, 266 P. 634, 270 P. 778, and part of the language above quoted was adopted by the Oregon court in *McKay v. Pacific Building Materials Co. et al.*, 156 Or. 578, 68 P.(2d) 127.

The law on this subject was recently summarized by the Oregon Supreme Court in *Byers v. Hardy*, 68 Or. Adv. Sh. 557, 337 P.(2d) 806, 809:

"The Employers' Liability Act makes no provisions for a so-called third party action similar to that found in the Workmen's Compensation Act. It is only the reference of risk and danger to 'the public' (ORS 654.305) which permits such an action to be brought at all. This court has consistently held that it is not every member of the public that is thus protected. It is only those whose

employment or duties require them to be about machinery of an employer other than his own or whose duties may require such person to expose himself in or about hazardous conditions or structures of such other employer which are prohibited or circumscribed by the Act. It must be a hazard or risk which the employer has created or permits to exist and which is within the control of the employee sought to be held. There must likewise be a commingling of function or duty of the injured person and the employees of the employer. In other words, the acts or omissions of the employer which give rise to a cause of action in behalf of an injured member of the public require active and direct participation on the part of the employer. *Turnidge v. Thompson*, 89 Or. 637, 175 P. 281; *Rorvik v. North Pac. Lumber Co.*, 99 Or. 58, 190 P. 331, 195 P. 163; *Drefs v. Holman Transfer Co.*, 130 Or. 452, 280 P. 505; *Myers v. Staub*, 201 Or. 663, 272 P.2d 203."

The Oregon decisions touching upon the various requirements that must be satisfied before a plaintiff can sue a third person not his own employer under the Employers' Liability Law are numerous and complex in their particular factual settings. However, the following rules of law may be adduced from these cases:

1. *Status of a Plaintiff.*

(a) A plaintiff must be an employee of someone, and he must sustain a relation towards a defendant that is different from that of a member of the public. (*Drefs v. Holman Transfer Co.*, 130 Or. 452, 280 P. 505; *Rorvik v. North Pacific Lumber Company*, 99 Or. 58, 190 P. 331, 195 P. 163; *C. D. Johnson Lbr. Co. v. Hutchens*, 194 F.(2d) 574 (CA9).

(b) In this case, petitioner's decedent was an employee of Larson. His relationship to respondent was different from that of a member of the general public since at the time of his death he was engaged in work on respondent's premises in furtherance of a contractual obligation which his employer had undertaken for respondent (R. 50-56).

2. *Duties of a Plaintiff.*

(a) A plaintiff's duties must require him to be present or to work in the vicinity of the hazardous condition which caused his injury or death, and his duties at the time of his injury must be hazardous and involve risk or danger. (*Rorvik v. North Pacific Lbr. Co.* (supra); *Drets v. Holman Transfer Co.* (supra); *McKay v. Pacific Building Material Co.* (supra); *Byers v. Hardy* (supra))

(b) In the instant case, the decedent's duties required him to work in the immediate vicinity of the turbulent water in the dam spillway which obviously involved risk and danger, and which was the immediate cause of the accident and his death (R. 56).

3. *Status of a Defendant.*

(a) A defendant must be an employer and there must be some common purpose or mutual economic benefit in the relationship between a defendant and plaintiff's employer. (*Drets v. Holman Transfer Co.*, (supra); *Coomer v. Supple Investment Co.*, 128 Or. 224, 274 P. 302; *Myers v. Staub*, 201 Or. 663, 272 P.(2d) 203)

(b) Concededly, respondent was an employer of persons who operated Bonneville Dam, and the mutual economic benefit and common purpose between respondent and Larson arose out of the contract which Larson had made with respondent for repair of the spillway baffle deck. The contract contemplated that Larson would inform respondent of all steps he proposed to take affecting the operation of the spillway dam, and respondent's employee Leonti acted as liaison between Larson and those employees of respondent concerned with the operation of the dam (R. 51-53).

4. *Duties of a Defendant.*

(a) A defendant must have had "... a primary control of the physical instrumentalities immediately in use and which are the media of the injuries or death giving rise to a claim for damage ..." (*Myers v. Staub* (supra) at p. 276; *Byers v. Hardy* (supra))

(b) The court below found that Bonneville Dam was under the ownership and control of respondent (R. 50). Respondent's employees had exclusive control over the opening and closing of the dam gates which regulated the flow of the river and the turbulence of the water being discharged through the gates (R. 52, 57). The court below found that the immediate cause of the accident was the turbulent condition of the water (R. 55).

5. *A Defendant's Active Operations.*

(a) The instrumentality causing the injury must be actively operated by a defendant in a way directly

affecting the plaintiff, and such operation must have been contemplated between the defendant and the plaintiff's employer, as distinguished from a situation where the defendant is engaged in no active operation and its equipment is inert. (*Tamm v. Sauset*, 67 Or. 292, 135 P. 868; *Walters v. Dock Commission* (supra); *Myers v. Staub* (supra); *Warner v. Synnes*, 114 Or. 451, 230 P. 362, 235 P. 505.)

(b) Again, the findings of fact demonstrate that respondent's operation of the dam and its exclusive control over the discharge of waters therefrom directly affected petitioner's decedent in the performance of his work for Larson. Finding of Fact No. 5 states: "It [the contract] further contemplated that the construction of the cofferdam would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse" (R. 51).

Thus, the evidence and the findings of fact meet all the requirements of the Oregon law for holding that respondent was subject to the duties imposed by the Employers' Liability Law of Oregon, and particularly that its duty to petitioner's decedent was to "... use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices" (ORS 654.305).

Nevertheless, as an alternate ground, the trial court in its opinion stated that the Employers' Liability Law "... is not applicable for the reason that the Government was not responsible for the work there being performed ..." (R. 47). The court made findings to the effect that there were no employees of the United States engaged in the sounding operation which resulted in the death of petitioner's decedent, and that there was no intermingling of employees of the United States with employees of the independent contractor in connection with the work then being performed (R. 58-59). The trial court further found that respondent was not in charge of, responsible for or engaged in the work being performed by Larson which resulted in the fatal accident (R. 59).

The fatal defect in these findings is that under the Oregon authorities above cited, it was not necessary for petitioner to show that employees of respondent and Larson physically intermingled in connection with the work being performed by Larson and his employees in order for petitioner's decedent to be under the protection of the Employers' Liability Law. Nor was it necessary to show that respondent was in charge of, or responsible for, the work then being done by Larson and his employees. The important fact was that the respondent had control of and was engaged in the operation of the dam, and that this involved risk and danger to Larson's employees who were required in the course of their work to be in the vicinity of the turbulent waters of the spillway. The United States not only controlled the active dam operation and regulated the turbulence of the waters

through the opening and closing of the dam gates, but also knew that Larson's operations and plans required some of his employees to venture into an area of risk and danger created and maintained by respondent.

An Oregon case closely in point is *Walters v. Dock Commission*, 126 Or. 487, 266 P. 634, 270 P. 778. In that case, the Portland Dock Commission maintained a dock adjacent to a milling plant. A spur track was located on the dock and crossed the roadway leading over the dock to the plant. On the day of the accident the roadway leading to the plant was blocked by empty cars on the track. Decedent, a plant employee, attempted to move one of these cars. At that moment, defendant's employees, at the other end of the track, ejected another railroad car which rolled down an incline and collided with standing cars, causing the leading car to strike and kill the decedent. The court held that defendant in its operation of propelling freight cars down the track knew that the milling company's employees occasionally moved cars at the other end, and that the jury was entitled under the evidence to find that defendant owed to plaintiff's decedent the high degree of care prescribed by the Employers' Liability Law. There was no intermingling of employees of the Dock Commission and the milling company in the *Walters* case, nor was the Dock Commission responsible for, or in control of, the work being performed by the decedent in the scope of his employment for the milling company. Similarly, in the case of *Clayton v. Enterprise Electric Co.*, 82 Or. 149, 161 P. 411, which was followed by the Supreme Court of Oregon in *Myers v. Staub*, 201 Or.

663, 272 P.(2d) 203, there was no intermingling of employees of two different employers.

Thus, the district court's conclusion of law No. 5 to the effect that respondent "... was not responsible for the work being performed by plaintiff's decedents so as to be liable to them under the Oregon Employers' Liability Act" (R. 61) was induced by an erroneous interpretation of the Oregon law.

The final inquiry then is whether or not the evidence and the findings of fact affirmatively show that respondent performed its statutory duty and did use every device, care and precaution which it was practicable to use for the protection and safety of the life and limb of petitioner's decedent, without materially impairing the efficiency of the operation of the dam.

The findings demonstrate that the respondent's employee Leonti knew that Larson's employees proposed to take soundings in bay 9 and that Larson intended to take a tug and barge out on the water below the dam and push the barge into bay 9. Respondent knew that only gates 9 through 17 were to be closed for this operation; that gate 8 was open 32 inches and that approximately 5,700 cubic feet of water per second was being discharged therefrom; that gate 7 was open 55 inches and that 9,100 cubic feet of water per second was being discharged therefrom; and that gate 6 was open 32 inches and that approximately 5,700 feet of water per second was being discharged through this gate (R. 54, 56-57). Furthermore, Mr. Capps admitted that respondent could have closed one more gate had a request to do so been

made by the contractor (R. 142). The closing of gate 8 would have cut down the turbulence of the water immediately adjacent to gate 8, without increasing the flow of water in gates 1 to 7 (R. 142, 145), and such a closing would not have impaired the efficiency of the dam operation (R. 142).

Accordingly, there is overwhelming evidence in the record that respondent breached its duty to petitioner's decedent under the Employers' Liability Law in failing to close a sufficient number of spillway gates in and near the vicinity of the work being undertaken by Larson and his employees in order to furnish a quiet pool in which to work, or in failing to warn decedent's employer as to the dangerous condition created by the turbulent waters in the immediate vicinity of the place where respondent knew the work would be carried on. That the breach of this duty proximately caused the accident and the death of petitioner's decedent is established by Finding No. 16, which states (R. 56):

"The immediate cause of the accident and the deaths of the men was the turbulent condition of the water, which made it impossible to control the movements of tug Muledozer and barge and caused the barge to strike the pier."

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit, affirming the dismissal of this action by the Oregon district court should be reversed and remanded to the district court for an assessment of damages.

While application of the high standard of care prescribed by the Oregon Employers' Liability Law may result in the establishment in this case of "novel and unprecedented governmental liability," this Court stated in *Rayonier Incorporated v. United States*, 352 U.S. 315, 319:

"... the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

Respectfully submitted,

CLEVELAND C. CORY,
GEORGE H. FRASER,
CLAYTON HESS,

Counsel for Petitioner,
1410 Yeon Building,
Portland 4, Oregon.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b).

Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

“Federal agency” includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

“Employee of the government” includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The Oregon Employers' Liability Act provides as follows:

654.305 *Protection and safety of persons in hazardous employment generally.* Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

654.310 *Protective measures to be observed regarding certain machines, equipment and devices which are dangerous to employees.* All owners, contractors, subcontractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four

times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employes of the owner, contractor or subcontractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

654.315. *Persons in charge of work to see that ORS 654.305 to 654.335 is complied with. The owners, contractors, subcontractors, foremen, archi-*

pects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

654.320 *Who considered agent of owner.* The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

654.325 *Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs, and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

654.330 *Fellow servant's negligence as defense.* In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

654.335 *Contributory negligence.* The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

INDEX

	Page
Opinions below	
Jurisdiction	
Questions presented	2
Statutes involved	2
Statement	2
1. The undisputed facts	2
2. Proceedings below	8
Summary of argument	11
Argument	14
I. Petitioner's claim is grounded upon an alleged maritime tort	15
II. The Oregon Employers' Liability Law could not be applied to a maritime tort action between private parties in like circumstances	17
A. Introduction	17
B. The substantive standards of tort liability for injuries occurring on navigable waters are exclusively federal and may not be displaced by state law	19
C. Neither the "local concern" test nor the "twilight zone" concept governing the application of state workmen's compensation laws to maritime injuries is applicable to the determination of tort liability	27
D. A state wrongful death statute may not be applied to create a cause of action for a death occurring on navigable waters unless there was also a breach of duty under the standards of the maritime law	34
III. Since the Oregon Employers' Liability Law could not be invoked in an action against a private individual in like circumstances it cannot be invoked against the United States under the Federal Tort Claims Act	36
IV. The Oregon Employers' Liability Law is by its own terms inapplicable	40

Conclusion.....	47
Appendix.....	49

CITATIONS

Cases:

<i>Admiral Peoples, The</i> , 295 U.S. 649.....	26
<i>Atkinson v. State Tax Commission</i> , 156 Ore. 461, affirmed, 303 U.S. 20.....	28
<i>Byers v. Hardy</i> , 68 Ore. Adv. Sh. 557, 337 P. 2d 806.....	46
<i>Camenzind v. Freeland Furniture Co.</i> , 89 Ore. 158.....	26
<i>Carlisle Packing Co. v. Sandanger</i> , 259 U.S. 255.....	22
<i>Chelentis v. Luckenbach S.S. Co.</i> , 247 U.S. 372.....	21, 22
<i>Cordrey v. Steamship "Bee"</i> , 102 Ore. 636.....	16
<i>Davis v. Department of Labor</i> , 317 U.S. 249.....	30, 31, 32
<i>Drefs v. Holman Transfer Co.</i> , 130 Ore. 452.....	45
<i>Eastern Air Lines v. Union Trust Co.</i> , 221 F. 2d 62, certiorari denied sub nom. <i>Union Trust Co. v.</i> <i>United States</i> , 359 U.S. 911.....	38
<i>Fromme v. Lang</i> , 131 Ore. 501.....	26
<i>Garrett v. Moore-McCormack</i> , 317 U.S. 239.....	23
<i>Grant Smith-Porter Co. v. Rohde</i> , 257 U.S. 469.....	15, 27, 28, 29
<i>Hahn v. Ross Island Sand & Gravel Co.</i> , 358 U.S. 272.....	32, 33, 34
<i>Hamilton, The</i> , 207 U.S. 398.....	34
<i>Hoffman v. Broadway Hazelwood</i> , 139 Ore. 519.....	26
<i>Howard v. Foster and Kleiser Co.</i> , 67 Ore. Adv. Sh. 465, 332 P. 2d 621.....	26
<i>Indian Towing Co. v. United States</i> , 350 U.S. 61.....	39
<i>Jacob v. New York City</i> , 315 U.S. 752.....	26
<i>Johnson v. Chicago & Pacific Elevator Co.</i> , 119 U.S. 388.....	16
<i>Just v. Chambers</i> , 312 U.S. 383.....	35
<i>Kermarec v. Compagnie Generale</i> , 358 U.S. 625. 24-25, 26, 27	26, 27
<i>Lauritzen v. Larsen</i> , 345 U.S. 571.....	37, 38
<i>Lawton v. Morgan, Fliedner & Boyce</i> , 66 Ore. 292.....	44
<i>Leathers v. Blessing</i> , 105 U.S. 626.....	26
<i>Lottawanna, The</i> , 21 Wall: 558.....	18
<i>McDonald v. City of New York</i> , 36 F. 2d 714.....	16
<i>Maine v. United States</i> , 45 F. Supp. 35, affirmed, 134 F. 2d 574, certiorari denied, 319 U.S. 772.....	39, 40
<i>Martin v. West</i> , 222 U.S. 191.....	15, 16
<i>Max Morris, The</i> , 137 U.S. 1.....	26
<i>Minnie v. Port Huron Terminal Co.</i> , 295 U.S. 647.....	16

Cases—Continued

	Page
<i>Moran v. United States</i> , 102 F. Supp. 275.....	37
<i>Pacific States Lumber Co. v. Bargar</i> , 10 F. 2d 335.....	45
<i>Panoil, The</i> , 266 U.S. 433.....	28
<i>Phenix Insurance Co., Ex parte</i> , 118 U.S. 610.....	16
<i>Plymouth, The</i> , 3 Wall. 20.....	15, 16
<i>Pope & Talbot, Inc. v. Hawk</i> , 346 U.S. 406.....	23-24
<i>Robins Dry Dock Co. v. Dahl</i> , 266 U.S. 449.....	22, 23, 29
<i>Romero v. International Terminal Co.</i> , 358 U.S. 354.....	17, 18, 37
<i>Rorvik v. North Pac. Lumber Co.</i> , 99 Ore. 58.....	16, 45
<i>Russell, Poling & Co. v. United States</i> , 140 F. Supp. 890.....	37
<i>Shelton v. Paris</i> , 199 Ore. 365.....	26
<i>Smith & Son v. Taylor</i> , 276 U.S. 179.....	16
<i>Somerset Seafood Co. v. United States</i> , 193 F. 2d 631.....	37
<i>Southern Pacific Co. v. Jensen</i> , 244 U.S. 205.....	17,
19, 20, 21, 25, 26, 27, 29, 30	
<i>State Road Department v. United States</i> , 78 F. Supp. 278.....	37
<i>Swayne and Hoyt v. Barsch</i> , 226 Fed. 581.....	15
<i>Tamm v. Sauset</i> , 67 Ore. 292.....	44
<i>Tungus, The v. Skovgaard</i> , 358 U.S. 588.....	35, 36
<i>Walters v. Dock Commission</i> , 126 Ore. 487.....	45
<i>Warner v. Synnes</i> , 114 Ore. 451.....	43, 44
<i>Washington v. Dawson & Co.</i> , 264 U.S. 219.....	29
<i>Western Fuel Co. v. Garcia</i> , 257 U.S. 233.....	35
<i>Workman v. New York City</i> , 179 U.S. 552.....	20-21
Constitution and statutes:	
Constitution of the United States, Article III.....	18
Act of August 30, 1935, 49 Stat. 1028.....	3
Federal Tort Claims Act:	
28 U.S.C. 1346(b).....	37, 49
28 U.S.C. 2674.....	37, 49
Judiciary Act of 1789, Sec. 9, 1 Stat. 77.....	21
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 <i>et seq.</i>	30, 32
National Industrial Recovery Act, 48 Stat. 195.....	3
50 Stat. 731, 16 U.S.C. 832.....	3
62 Stat. 496, 46 U.S.C. 740.....	17

Constitution and Statutes—Continued

Oregon Employers' Liability Law, Oreg. Rev. Stat.:	Page
Section 654.305	14, 42, 49
Section 654.310	42, 50
Section 654.315	51
Section 654.320	51
Section 654.325	8, 14, 51
Section 654.330	52
Section 654.335	53
Oregon Wrongful Death Act, Oreg. Rev. Stat. 30.020	8
Workmen's Compensation Code, Oreg. Rev. Stat. 656.024	33
Miscellaneous:	
<i>Bonneville Dam</i> , pamphlet prepared by the Corps of Engineers, Portland District	3
72 Harv. L. Rev. 1363	34
H. Rep. 1287, 79th Cong., 1st Sess., pp. 1-2	39
Magruder and Grant, <i>Wrongful Death Within Admiralty Jurisdiction</i> , 35 Yale L.J. 395	16
Robinson, <i>Tort Jurisdiction in American Admiralty</i> , 84 U. of Pa. L. Rev. 716	15
S. Rep. 1400, 79th Cong., 2d Sess., pp. 29-30	39
Stumberg, <i>Tort Jurisdiction in Admiralty</i> , 4 Tex. L. Rev. 306	16
37 Tex. L. Rev. 645	34
33 Tul. L. Rev. 899	34

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 5

HENRY L. HESS, JR., ADMINISTRATOR OF THE ESTATE
OF GEORGE WILLIAM GRAHAM, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 47-48) is reported at 1958 A.M.C. 660. Its findings of fact and conclusions of law (R. 48-62) are not reported. The opinion of the court of appeals (R. 241-255) is reported at 259 F. 2d 285.

JURISDICTION

The judgment of the court of appeals (R. 257) was entered on August 20, 1958. The petition for a writ of certiorari was filed on October 13, 1958, and granted on March 2, 1959. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Oregon Employers' Liability Law could be applied in an action on a maritime tort between private parties.

2. Whether the Government's liability under the Federal Tort Claims Act for an injury on Oregon navigable waters allegedly caused by the operation of a Government dam is governed by the general maritime law, as would be an action between private parties brought either in an Oregon state court or in a federal court.

3. Whether the Oregon Employers' Liability Law is by its terms inapplicable to the facts of this case.

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act and the Oregon Employers' Liability Law are set forth in the Appendix, *infra*, pp. 49-53.

STATEMENT

This Federal Tort Claims Act suit arose out of the death of George William Graham, a carpenter-foreman who drowned in the Columbia River while engaged in the performance of a contract entered into between his employer and the United States.

1. *The undisputed facts.*¹ The Columbia River, which has its source in the Canadian Rocky Mountains, flows southerly across the State of Washington, and then turns west to form the boundary between Washington and Oregon. In 1933, under the pro-

¹ None of the basic facts, as found by the district court, are challenged by the petitioner. Most of them were stipulated (R. 34-46).

visions of the National Industrial Recovery Act, 48 Stat. 195, government owned and controlled improvements were undertaken at Bonneville, 42 miles east of Portland and 146 miles above the mouth of the river. While these improvements, which were formally authorized in 1935² were under construction, Congress, on August 20, 1937, directed that (50 Stat. 731, 16 U.S.C. 832):

For the purpose of improving navigation on the Columbia River, and for other purposes incidental thereto, the dams, locks, power plant, and appurtenant works now under construction on August 20, 1937, as Bonneville, Oregon and North Bonneville, Washington (hereinafter called Bonneville project), shall be completed, maintained and operated under the direction of the Secretary of War and the supervision of the Chief of Engineers, * * *.

At Bonneville, the Columbia River is divided into two channels by Bradford Island (R. 50). The powerhouse and navigation lock are situated (R. 50) from the island south to the Oregon shoreline. From the island north to the Washington shoreline is a spillway dam—one of whose principal functions, according to the Corps of Engineers, is to maintain the desired water level in the upper pool above Bonneville in order to assure navigational depths from Bonneville to the Celilo Canal (R. 50).³ The dam

² Act of August 30, 1935, 49 Stat. 1028, 1038.

³ *Bonneville Dam*, pamphlet prepared by the Corps of Engineers, Portland District.

Control of the level of the upper pool is also necessary in order to provide sufficient difference in elevation between the

contains 18 bays, numbered consecutively from the fishway bay on the Washington shore (Bay 1) to the fishway bay at Bradford Island (Bay 18) (R. 50). Each bay has a movable gate which opens and closes in a vertical direction (R. 50). When closed, the gates rest on the top of the so-called "ogee" section (*i.e.*, the upper line of the submerged stationary portion of the dam) (R. 50).

Downstream, on the bed of the river, is a concrete structure known as the "baffle deck" because concrete blocks, or "baffles," are built into it (R. 50). The purpose of the baffles is to dissipate the energy of the water discharged through the dam and thereby reduce its downstream velocity (R. 50-51).

During the period of years after the completion of the dam in 1938, the baffle deck and baffles had become eroded by the flow of water (R. 51). Consequently, on June 23, 1954, the Corps of Engineers entered into a contract with Robert C. Larson, doing business as the Larson Construction Company, for the restoration of the south half of the eroded baffle deck (R. 51). The contract contemplated that Larson would construct a cofferdam which would seal off particular areas, thereby permitting the water to be drained off and the deck to be exposed (R. 51). This construction was to be undertaken by Larson without interruption of the normal power generation of the powerhouse (R. 51). The contract further contemplated that the construction work would be commenced while water was being necessarily dis-

upstream pool and downstream "tailwater" needed to operate the power house turbines. *Ibid.*

charged through the spillway dam, until such time as the flow of the river had receded to a point where it could be handled entirely through the powerhouse (R. 51). Larson was to inform the Government of all proposed action on his part which would have an effect upon the operation of the spillway dam (R. 51).

On July 14, 1954, the Corps of Engineers gave notice to Larson to proceed with the performance of the contract, and the latter thereupon started the preliminary marshaling of necessary equipment and construction materials (which he was contractually obligated to furnish, along with all necessary labor) (R. 52). On August 13, 1954, Larson was notified that, in accordance with the provisions of the contract, the construction work on the cofferdam was to be started within ten days (R. 52). On the same day, Larson conferred with Alfred M. Capps, the project superintendent in charge of the operation of the Bonneville dam, regarding the possibility of closing a number of the gates of the spillway dam during the preliminary construction work on the cofferdam (R. 52). As a result of this conference, the gates in Bays 11 through 17 were immediately closed (R. 52).

Between August 16 and August 20, 1954, the Government construction project engineer, Patrick S. Leonti, conferred with Larson and his acting superintendent, Harry Claterbos, with respect to their plans for carrying out the contract (R. 53). As project engineer, Leonti's duties included inspection of the project during the construction to ascertain that Larson was meeting the contract specifications, and serving as liaison between Larson and the Government

employees responsible for the operation of the dam (R. 53). Leonti informed Larson that any requests to close additional gates of the spillway dam should be directed to him, and that he would then relay those requests to the appropriate operational personnel (R. 53).

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib in Bay 9, which was to rest on the ogee curve and to run from the top of that curve at right angles to the face of the dam (R. 53). Because the contract drawing reflected the cross-section of the ogee as originally constructed, and because he thought it might subsequently have become eroded to some extent, Larson determined that it was necessary to take soundings to establish its true cross-section at the time (R. 53-54). The contract itself neither required nor referred to the taking of such soundings (R. 54).

On August 18, Larson advised Leonti of his intention to take the soundings on August 20 (R. 54). Leonti was further advised that Larson proposed to accomplish this objective by pushing a barge into Bay 9, off the side of which the soundings would be taken (R. 54). Larson requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 p.m. on August 20 in order to facilitate the operation (R. 54). At no time did Larson, or his representatives, request that any of the other open gates be closed (R. 54).

Leonti forwarded the request to the operations division of the dam, and it was fulfilled (R. 54). On August 19, Larson's superintendent, Claterbos, undertook a reconnaissance trip of the area in a tugboat for

the purpose of ascertaining whether the proposed manner of taking the soundings was safe (R. 54-55). On the basis of this reconnaissance trip, and his own personal observation of the situation, Larson determined for himself that it was safe (R. 55). The advice of the Government on the matter was not sought (R. 55).

Shortly before 2:00 p.m. on August 20, Larson's tug MULEDUZER set out from the Bradford Island shore of the river, pushing Larson's barge FOREST No. 12 (R. 55). The barge was made fast to the tug by four steel lines (R. 56). Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug (R. 56). The other lines ran from the stern mooring bits of the barge to the stern winches of the tug (R. 56).

On board the tug or barge were six Larson employees: two crew members (Magnor Larson and Coles) and four members of the sounding party (Graham, Boylan, Tobias and Lewis) (R. 55). Tobias, a civil engineer, was in charge of the operation and none of the others in the sounding party had any control over the manner in which it was to be conducted (R. 55). All of the personnel involved, as well as all of the equipment utilized, had been selected by Larson alone (R. 55).

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and then proceeded upstream toward Bay 9 (R. 56). As the barge reached that Bay, it veered in a northerly direction and its port bow struck a pier located between Bays 8 and 9 (R. 56). As a result, the bow

was stove in and, as water came in through the hole, the barge moved in front of Bay 8 and the other open bays to the north (R. 56). Both the barge and tug swamped and sank; the former being broken to pieces (R. 56). All those aboard were thrown in the water and, with the exception of Coles, were killed.

2. *Proceedings below.* On April 18, 1955, this suit was brought under the Federal Tort Claims Act to recover damages for Graham's death (R. 1-10). On December 3, 1956, a pretrial order was entered, which raised the issue as to whether appellant's remedy was under the Oregon Wrongful Death Act, Ore. Rev. Stat. 30.020, or the Oregon Employers' Liability Law, Ore. Rev. Stat. 654.325 (R. 19-33). Petitioner contended that he was entitled to rely on the Employers' Liability Law, *infra*, pp. 49-53, notwithstanding the fact that the death of his decedent had occurred on navigable waters (R. 30). The Government's position was that actions for damages for death of a workman on navigable waters within the territorial limits of the State of Oregon are governed by general maritime laws; and that, as a consequence, only the Wrongful Death Act could be applied (R. 30-31).⁴

On March 29, 1957, the district court filed an opinion in which it ruled that the Employer's Liability Law was inapplicable for two separate and distinct reasons: (1) the Government was not responsible for the work being performed by Larson; and (2) the law could not be constitutionally applied to this case

⁴The pretrial order reserved the question as to whether the Employers' Liability Law was inapplicable for some other reason (R. 31-32).

(R. 47-48). The court further determined that petitioner had failed to prove that the Government was negligent in any respect and that, therefore, he was not entitled to recover under the Oregon Wrongful Death Act (R. 48).

On May 9, 1957, the district court filed its findings of fact and conclusions of law (R. 48-62). In addition to the above-mentioned facts, the court found (R. 56-59) that (1) the proximate cause of the accident had been the turbulent condition of the water in the spillway basin; (2) this condition had been open, apparent and obvious to Larson, the tugboat operator and his other employees; (3) the difference in elevation of the water in the turbulent area opposite the open gates in the spillway basin, as compared with the area opposite the closed gates, also had been visible and obvious; (4) Larson had been an independent contractor and had not operated under the supervision, control and direction of the United States; (5) the Government had had no control over the details, manner or method by which the work under the contract was to be accomplished, but had been interested only in insuring a general result in conformity with the contractual specifications and had retained a mere right to inspect the work during its progress in order to determine whether this result was being obtained; (6) Larson had determined for himself the method, manner and means by which the sounding operation would be carried out, and no employee of the United States participated in the operation or gave Larson or any of his employees directions or orders with respect thereto; (7) no employees of

States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States and of each other with foreign states.

It was from that principle of uniformity that the classic formulation in *Jensen* of the dividing line between state and federal authority was drawn: that no state law may be applied which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations" (244 U.S. at 216).

Obviously, such statements of general principles are not self-executing and the allocation of state and federal authority as to any particular aspect of maritime transactions can be finally established only by the process of adjudication. By that process, however, the Court has, as we shall attempt to show, made clear that the principle of uniformity requires that the substantive rules governing tort liability for injuries occurring on navigable waters not be varied by state laws.

B. THE SUBSTANTIVE STANDARDS OF TORT LIABILITY FOR INJURIES OCCURRING ON NAVIGABLE WATERS ARE EXCLUSIVELY FEDERAL AND MAY NOT BE DISPLACED BY STATE LAW

As to each incident of the law governing maritime transactions, different considerations bearing on the proper scope of federal and state law may come into play, and that is true even within the area of rights and liabilities arising out of personal injuries. Thus,

distinctions must be made, as we shall show, between tort liability and workmen's compensation and, even within the area of tort liability, between the substantive standards of liability and the availability of "remedies" to enforce those standards. The particular aspect with which we are concerned is the choice of the substantive standards of tort liability to be applied to maritime torts: *i.e.*, the basic rules governing conduct causing injuries on navigable waters. However uncertain may be the division of state and federal authority on other matters, in this area the Court has given full expression to the basic principle of uniformity and has rejected every attempt to apply state rules to the determination of substantive tort liability for injuries on navigable waters.

1. The controlling force of federal law in defining maritime tort liability was foreshadowed even before *Jensen*. Thus, for example, in *Workman v. New York City*, 179 U.S. 552, the Court sustained a judgment against the City for damages caused by the collision of a City fireboat with the libellant's ship, rejecting the City's defense that under state law it was not liable for harm inflicted in the performance of a "governmental" function (p. 558):

The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there

would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. * * *

It was in the decisions following *Jensen*, however, that the full scope of the principle was established. In *Chelentis v. Luckenbach SS. Co.*, 247 U.S. 372, decided at the next Term, a seaman brought a common-law action (under the saving-to-suitors clause of § 9 of the Judiciary Act of 1789, 1 Stat. 77) for damages for the loss of a leg allegedly because of the negligence of the ship's master. At that time the maritime law allowed no action against the ship owner for the negligence of the master, but limited the seaman's remedies to maintenance and cure (whether or not the injury was caused by negligence). The Court held that an action under the state law of negligence could not be maintained (pp. 382, 384):

* * * Under the doctrine approved in *Southern Pacific Co. v. Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common

law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

* * * Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. * * * [P]etitioner's rights were those recognized by the law of the sea.

See also *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, similarly holding that a seaman could not maintain a state court negligence action against a ship owner, although affirming a judgment for the seaman under the maritime law of unseaworthiness.

The decision most closely in point on its facts is *Robins Dry Dock Co. v. Dahl*, 266 U.S. 449. There, the plaintiff, while engaged in repair work on a vessel lying in navigable waters, was injured when the scaffolding on which he was standing broke. In a negligence suit against his employer for damages, the jury was charged that it might consider as evidence of negligence the provisions of the New York Labor Law requiring employers to furnish scaffolding which is not "unsafe, unsuitable or improper" and affords

"proper protection" to employees. This Court reversed a judgment for the plaintiff, holding that the provisions of the local law were irrelevant and should not have been considered by the jury: "The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute" (p. 457).

Many more recent decisions of this Court attest to the continued exclusiveness of federal law in determining substantive liability for maritime torts. Thus, in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, the Court held that the federal maritime law, rather than the law of the State in whose courts the suit was brought, governed the burden of proof on the validity of a release given by a seaman and asserted as a defense to his suit for damages under the Jones Act and for maintenance and cure. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, an employee of an independent contractor, on board a berthed vessel to repair loading equipment, fell through an uncovered hatch hole. In the employee's action against the ship owner, the jury found the owner negligent but the employee contributorily negligent. This Court sustained an award of damages on the negligence count under the maritime comparative-negligence rule, although contributory negligence would have been a complete bar under the state law, stating (p. 409-410):

* * * True, *Hawn* was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on

the Government had been engaged in the sounding operation and there had been no intermingling of employees of the United States with the Larson employees in connection with the work being performed at the time of Graham's death; and (8) the Government had not been in charge of, responsible for, or engaged in the work being performed by Larson which resulted in the accident. All of these findings have been accepted by petitioner.

In its conclusions of law, the district court reiterated its previous determination that the Oregon Employers' Liability Law was inapplicable and ruled that, since the United States was neither negligent itself nor chargeable with the negligence of Larson and his employees, liability under the Oregon Wrongful Death Act and the Federal Tort Claims Act had not been established (R. 60-61).

The court of appeals affirmed (R. 241-255). It held that, since the accident occurred on navigable waters, the applicable law of Oregon—the place where the act or omission occurred—was the general maritime law (R. 247-250). It further held that the Oregon Employers' Liability Law is not "a constitutionally permissible supplementation of the general maritime law" because it imposes a stricter standard of care, and therefore that "it could not constitutionally be applied in this case" (R. 250-252). Finally, the court determined that the findings of the district court relating to the negligence of the Government were supported by the evidence and that, therefore, liability could not be imposed under the Oregon Wrongful Death statute (R. 253-255).

SUMMARY OF ARGUMENT

This is a Federal Tort Claims Act suit arising out of the drowning of the decedent in navigable waters of the United States within the State of Oregon. The only issue here is whether there may be applied to this action the provisions of the Oregon Employers' Liability Law imposing a higher standard of care than that of the general maritime law.

I. The sole test for determining whether an action for tort is within the jurisdiction of admiralty is the locality where the alleged injury took place. In this case the decedent's drowning occurred in navigable waters of the United States and consequently the action is plainly within admiralty jurisdiction.

II. A. The basic governing law as to all matters within the admiralty jurisdiction is the general maritime law—a uniform body of federal law drawing its authority from the grant of admiralty jurisdiction in Article III of the Constitution. The underlying principle of uniformity provides a general guide to the extent to which that law may be supplemented by state law, but it is only through the process of adjudication as to each of the many incidents of maritime relationships that the division between state and federal authority has become concrete.

B. The particular aspect of the law governing maritime transactions with which we are concerned is that prescribing the substantive standards of tort liability. Whatever uncertainties there may be as to the applicability of state law in other areas, in this area the Court has made clear, by a long course of decisions

in which it has rejected every attempt to apply state rules to the determination of substantive tort liability, that the general maritime law is exclusive. Those decisions clearly require rejection of the state law sought to be invoked here.

C. Petitioner is in no way aided by the rules developed to determine the extent to which state workmen's compensation laws may be applied to injuries occurring on navigable water, for the policies governing the division of authority in the two areas of workmen's compensation and tort liability are basically different. That admiralty jurisdiction depends in tort on the locality of the injury but in contract on the nature of the transaction demonstrates that admiralty jurisdiction over various kinds of legal relationships need not be governed by the same incident. Thus, in defining the extent to which state compensation laws could validly be applied, the courts, although adopting in part the "locality of the injury" test controlling tort jurisdiction, modified it to allow state compensation laws to be applied to maritime injuries if the employee's activities were of "mere local concern". But that test has no application to tort cases and it has, we believe, never been so applied.

By the same token, the "twilight zone" concept, developed to overcome the difficulties of application of the "local concern" test in determining whether an employee's rights were governed by the state or federal compensation systems, likewise has no application to tort liability.

D. That this action is brought under a wrongful death provision of the Oregon Liability Law clearly

makes no difference. While a state wrongful death statute may be applied in admiralty to provide a remedy not accorded by the maritime law, there must first have been a breach of a duty defined by the maritime law and the wrongful death action cannot be used to vary the maritime standards of substantive tort liability.

III. Under the Federal Tort Claims Act the Government's liability in tort is determined in the same manner as that of a private individual under like circumstances according to the law of the place where the act or omission occurred. The place where the alleged act or omission occurred in this case was the State of Oregon, and since, under Oregon law (including maritime law), the Liability Law could not be applied in a suit against a similarly situated private person (as we have shown above), it likewise cannot be invoked against the United States in this action.

IV. Petitioner would not be assisted even if there were no constitutional obstacles to the application of the Oregon Employers' Liability Law. In terms, as well as by reason of the construction given it by the Oregon Supreme Court, that statute cannot serve as a basis for imposing liability in circumstances where, as the district court found to be the situation here, (1) the defendant was not in charge of, responsible for, or even engaged in, the work performed by the decedent at the time of his death; and (2) the independent contractor who employed the decedent, in full charge of the work and the conditions under which it

was being performed, affirmatively determined that those conditions posed no undue risk.

ARGUMENT

Petitioner does not challenge the findings below that the United States was not liable under the reasonable care standards of the general maritime law. His sole claim here is that the cause of action was governed by the Oregon Employers' Liability Law, which provides in part (§ 654.305, *infra*, pp. 49-50):

Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.⁵

It is the position of the Government that the Liability Law may not be applied to this action because a like action between private parties, being on a maritime tort, would be governed exclusively by the general maritime law, and the United States is liable under the Tort Claims Act only to the same extent as a private person would be in like circumstances. We

⁵ The Liability Law also provides a special action for wrongful death by reason of a violation of its provisions (§ 654.325, pp. 51-52, *infra*), and it is under that provision that petitioner, the administrator of the decedent's estate, is suing.

contend finally that the Liability Law is in any event inapplicable by its own terms.

I

PETITIONER'S CLAIM IS GROUNDED UPON AN ALLEGED MARITIME TORT :

It has long been established that "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance" so long as "the substance and consummation of the [wrong and injury complained of] have taken place upon [navigable] waters". *The Plymouth*, 3 Wall. 20, 35, 36. That "admiralty jurisdiction depends * * * in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled". *Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469, 476.

The locality of the tort, in turn, is determined not by the place where the force causing the injury was set in motion but by the place where "the causal influence of the negligent management * * * took effect injuriously and gave rise to a cause of action. * * *". *Martin v. West*, 222 U.S. 191, 197. Thus "where the tort is committed * * * partly on land and partly on water, the question whether admiralty has jurisdiction over it is determined by the place of the damage, and not by the place of the origin of the tort." *Swayne & Hoyt v. Barsch*, 226 Fed. 581, 588 (C.A. 9); see Robinson, *Tort Jurisdiction in American Admiralty*, 84 U. of Pa. L. Rev. 716, 748-754; Stumberg, *Tort Jurisdiction in Ad-*

miralty, 4 Tex. L. Rev. 306, 312-314. For example, where a longshoreman at work on a ship was struck by a swinging cargo hoist and knocked off the ship to the wharf, the right of recovery was held to be governed by maritime law because it was the "blow received on the vessel in navigable water which gave rise to the cause of action," with no inquiry being made whether the hoist was operated from the ship or the wharf. *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 648.⁶ On the other hand, where a longshoreman standing on a wharf was struck and knocked into the water by a loaded sling operated from a vessel, the case was held not to be of admiralty cognizance. *Smith & Son v. Taylor*, 276 U.S. 179.⁷ In short, therefore, "if the fatal force is applied to the body of the deceased on navigable waters; the admiralty would have jurisdiction although the chain of causation was originated by a negligent act on shore." Magruder and Grant, *Wrongful Death Within Admiralty Jurisdiction*, 35 Yale L. J. 395, 404.⁸

⁶ Similarly, where a workman upon a lighter moored in navigable waters received an eye injury from dust from a city dump on shore, the case was governed by maritime law. *McDonald v. City of New York*, 36 F. 2d 714 (C.A. 2) (per L. Hand, J.).

⁷ Since the question whether a tort is maritime is one of general maritime law, the Oregon courts, of necessity, have applied the same distinction. See *Cordrey v. Steamship "Bee"*, 102 Ore. 636; *Rorvik v. North Pac. Lumber Co.*, 99 Ore. 58.

⁸ The converse is also generally true, i.e., that admiralty jurisdiction does not extend to a tort which though initiated on navigable waters takes effect on land. See *The Plymouth*, 3 Wall. 20; *Ex parte Phenix Insurance Co.*, 118 U.S. 610; *Johnson v. Chicago & Pacific Elevator Co.*, 119 U.S. 388; *Martin v. West*, 222 U.S. 191. That limitation has, however, been modi-

In this case, the injurious force (the turbulent waters causing the tug to capsize) came into contact with, and caused the death of, decedent on navigable waters. Under established principles, therefore—which we do not understand petitioner to dispute—this suit, if between private parties, would clearly be within the admiralty jurisdiction, and it would be irrelevant whether the dam itself is deemed a land structure or a maritime aid to navigation.

II

THE OREGON EMPLOYERS' LIABILITY LAW COULD NOT BE APPLIED TO A MARITIME TORT ACTION BETWEEN PRIVATE PARTIES IN LIKE CIRCUMSTANCES

A. INTRODUCTION

The nature and sources of the law governing matters within the admiralty jurisdiction were recently canvassed by this Court in *Romero v. International Terminal Co.*, 358 U.S. 354, and need not be repeated here. As both the majority and the dissenting opinions there recognized (pp. 377–378, 391), it has been established at least since *Southern Pacific Co. v. Jensen*, 244 U.S. 205, if not before, that the basic system of jurisprudence governing maritime matters, whether arising in a state or federal court, is a body of uniform federal law drawing its authority from the constitutional grant of federal judicial power over “all

fied by Congress, which in 1948 provided that admiralty jurisdiction should extend to all injuries “caused by a vessel * * * notwithstanding that such damage or injury be done or consummated on land.” 62 Stat. 496, 46 U.S.C. 740:

Cases of admiralty and maritime Jurisdiction" (Art. III, § 2, cl. 1).

That is not to say that every aspect of maritime relationships is governed exclusively by federal law. To the contrary, it is equally clear that there are numerous incidents to which state law may validly be applied to supplement the federal law. As the Court noted in *Romero*, state laws governing liens, remedies for wrongful death, survival of actions, partition and sale of ships, specific performance of arbitration agreements, and aspects of maritime insurance have all been enforced in admiralty (358 U.S. at 373). That a subject matter is within the admiralty "jurisdiction" (e.g., maritime torts), therefore, does not necessarily mean that state laws may not be applied to it. There remains the problem, as to each legal relationship, of defining the permissible scope for the operation of state laws.

Certainly, the main guidepost in determining the extent to which state laws may be applied to matters within the admiralty jurisdiction is the basic principle of uniformity found implicit in the constitutional grant of admiralty jurisdiction and which was the very reason for the development of a federal maritime law. As explained in *The Lottawanna*, 21 Wall. 558, 575, the grant of federal admiralty jurisdiction in Article III had reference to:

a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several

a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features" *Panama R. Co. v. Johnson*, 264 U.S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for * * * negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. * * *

Finally, the Court reaffirmed only last term that federal maritime law, not state law, governs substantive tort liability for injuries upon navigable waters. In *Kermarec v. Compagnie Generale*, 358 U.S. 625, the plaintiff was injured, allegedly because of a defective stairway, while aboard a berthed vessel to visit a crew member. The Court held that the plaintiff's action for negligence against the ship owner was to be governed by the maritime standard of reasonable care, rather than by the state law rule that a "gratuitous licensee" is entitled only to be warned of dangerous conditions within the actual knowledge of the defendant, saying (p. 628):

The District Court was in error in ruling that the governing law in this case was that of the State of New York. *Kermarec* was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. * * * *

The unanimous decision in *Kermarec*, we believe, accurately sums up the effect of the long series of decisions by this Court rejecting the application of state law to questions of substantive liability for maritime torts. It holds, in effect, that the choice of substantive tort law depends solely on whether or not it is a maritime tort. If the injury occurred on navigable waters and is thus within the admiralty jurisdiction, the inquiry is at an end; federal maritime law is controlling and varying state rules are irrelevant.

2: Ignoring the decisions of this Court dealing specifically with the law governing substantive tort liability, petitioner invokes the vague formulation of *Jensen* and contends that the application of the Oregon Employers' Liability Law to a maritime tort would not materially prejudice the "characteristic features" of the maritime law because the "incidents" of the cause of action thus created are not "hostile" to those features. This Court has not left the matter to an

* The Court further held that the maritime rule of comparative negligence, rather than the state rule that contributory negligence was a complete bar, was controlling. *Id.* at 629.

exercise in abstract verbalisms, however, but has made concrete the application of *Jensen* to questions of substantive tort liability by repeatedly holding that it is maritime law, and only maritime law, that may be applied to maritime torts.

Properly viewed, the issue in this case is really one of choosing between maritime law and state law and not, as petitioner phrases it, one of "supplementing" the maritime law. The standard of liability under the maritime law is "reasonable care"¹⁰; the standard under the Oregon Employers' Liability Law, a "much higher degree of care." *Hoffman v. Broadway Hazelwood*, 139 Ore. 519, 524.¹¹ But since a standard of care prescribes the extent of the defendant's duties as well as that of the plaintiff's rights, it is obvious that both cannot be applied to the same transaction. The higher standard of care of the Oregon law directly conflicts with the maritime standard of reasonable care in precisely the same way as

¹⁰ *Kermarrec v. Compagnie Generale*, 358 U.S. 625, 632; *Leathers v. Blessing*, 105 U.S. 626; *The Max Morris*, 137 U.S. 1; *The Admiral Peoples*, 295 U.S. 649; *Jacob v. New York City*, 315 U.S. 752.

¹¹ See, e.g., *Camenzind v. Freeland Furniture Co.*, 89 Ore. 158, 172-173:

In the absence of a statute the master is only required to employ reasonable care in providing a safe place to work and if by due care and reasonable expense the employer can lessen the risk to the employee it is his duty to do so: * * *. The statute, however, has enlarged the duty of the master and instead of being satisfied with the exercise of reasonable care the law now requires the master to use every device, care and precaution which it is practicable to use for the safety of the servant * * *.

See also *Fromme v. Lang*, 131 Ore. 501, 504, 505; *Shelton v. Paris*, 199 Ore. 365, 368; *Howard v. Foster and Kleiser Co.*, 67 Ore. Adv. Sh. 465, 332 P. 2d 621.

did the lower standard of care of the New York law sought to be applied in *Kermarec*, and, as there, the choice must be made whether state or federal law shall govern. And if the state standard of care can be applied here, there would be no basis for rejecting a state defense of contributory negligence in like circumstances.

Clearly, two systems of law with differing substantive rules governing the same transaction can co-exist only with some standard by which to choose which of the rules is to be applied to a particular case. Petitioner's suggestion would seem to be that in each case the rule should be applied which is of greatest benefit to the plaintiff. But the uniformity sought to be achieved by the maritime law—the very reason for its creation—was as much (if, indeed, not more) a uniformity of defendants' obligations as a uniformity of plaintiffs' rights. The maritime law, created to avoid the disuniformity of multiple state laws, would thus, under petitioner's view, be used simply to add to the multiple state laws one more system of laws from which plaintiffs might choose.

C. NEITHER THE "LOCAL CONCERN" TEST NOR THE "TWILIGHT ZONE" CONCEPT GOVERNING THE APPLICATION OF STATE WORKMEN'S COMPENSATION LAWS TO MARITIME INJURIES IS APPLICABLE TO THE DETERMINATION OF TORT LIABILITY

1. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, and *Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469, read together, established the rule that state workmen's compensation legislation could not be applied to injuries occurring on navigable waters unless the

activity in which the employee was engaged was of "mere local concern".¹² Petitioner apparently contends that if state compensation laws may be applied to "local" maritime injuries it must follow that state tort law may be applied to the same kind of injuries. Even accepting *arguendo* petitioner's premise that the repair of the Bonneville dam was a matter of "mere local concern" within the meaning of that test,¹³ it is clear, we submit, that that test has no application to questions of tort liability.

Petitioner's mistake is in assuming that the division of state and federal powers must turn on the same "jurisdictional fact" regardless of the nature of the legal relationships sought to be regulated—which is surely not the case. For example, while admiralty

¹² As the test was phrased in the cases following *Rohde* and relied on by petitioner (Pet. Br. 28-29):

¹³ In fact, however, the decedent's activity in taking soundings for the construction of the cofferdam preparatory to repairing the baffle deck of the spillway dam was "not of mere local concern." As we noted above (*supra*, p. 3), Congress authorized the completion of the Bonneville project for "the purpose of improving navigation on the Columbia River and for other purposes incidental thereto." Moreover, the spillway dam has a principal function of maintaining the water above the dam at navigable depths. Even the baffle deck has a specific maritime purpose: to dissipate the velocity of the downstream flow of water. Consequently, the decedent's work not only was not of "mere local concern," but was directly concerned with aiding navigation on the Columbia River. Cf. *Atkinson v. State Tax Commission*, 156 Ore. 461, 463, affirmed, 303 U.S. 20. The petitioner's reliance upon *The Panoil*, 266 U.S. 433, is misplaced. Whether admiralty law would control if the spillway dam were damaged by being struck by a ship is irrelevant. The issue is merely whether the decedent's activity was of more than local concern and, we submit, repair of the Bonneville spillway dam satisfies that test.

jurisdiction in tort matters depends on the locality of the injury, jurisdiction in contract matters depends on the nature of the transaction. *Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469, 476. Thus, the rights in tort of a passenger injured on a vessel would be governed by the maritime law, but his rights to recover for the same injury under a general accident insurance policy would be governed by state law.

There is, therefore, no necessary reason for the standards governing the applicability of state compensation law and state tort law to maritime injuries to be the same, and it is sufficient to refer to Mr. Justice Brandeis' analysis of the differences between workmen's compensation and tort liability, and the former's greater analogy to contractual liability, to demonstrate that there are many reasons for them to be different. See *Washington v. Dawson & Co.*, 264 U.S. 219, 233-234 (dissenting opinion). Indeed, the surprising thing—and the aspect for which *Jensen* has been most vigorously criticized—is that the place of the injury was made relevant at all (though not controlling, as in tort, since it was modified by the “local concern” exception) to the application of workmen's compensation laws. But whatever the merits of the particular hybrid standard adopted in workmen's compensation cases, that standard never did, and does not now, have any application to the choice of law governing tort liability.¹⁴

¹⁴ It must be admitted that the Court has not always kept the distinction between compensation cases and tort cases clearly in mind and, on occasion, in rejecting the application of state law to a maritime tort, has observed that the matter “was not of mere local concern,” citing the *Rohde* case. *Robins Dry*

2. The "twilight zone" concepts developed in the compensation cases are equally inapplicable to questions of tort liability. A brief summary of the development of those concepts, as explained in *Davis v. Department of Labor*, 317 U.S. 249, will make that clear. Because of the limited scope allowed to state compensation statutes under *Jensen* and its progeny, Congress, in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, provided a federal system of compensation for maritime workers to be applicable whenever compensation could not "validly be provided by State law" (33 U.S.C. 903). Since rights under the state and federal acts were thus made mutually exclusive, this still required a determination in every case whether state compensation could "validly be provided" under *Jensen*. Whether an activity was sufficiently "local" in nature to permit application of state compensation laws under the *Rohde* test, however, proved to be a standard incapable of predictable application, with the result that employees frequently found that they had pursued the wrong remedy. As the Court explained in *Davis* (p. 254):

As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while

Dock Co. v. Dahl, 266 U.S. 449, 457, discussed *supra*, pp. 22-23. The fact remains, however, that in no case has the Court ever actually applied the "local concern" test to allow state law to be applied to determine liability *in tort* for an injury occurring on navigable waters.

he was erroneously pursuing it elsewhere. See e.g., *Ayres v. Parker*, 15 F. Supp. 447. Such a result defeats the purpose of the federal act, which seeks to give "to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation," and the state Acts such as the one before us, which aims at "sure and certain relief for workmen."

To relieve that uncertainty, and the resulting frustration of the policy of both the federal and state acts to provide a prompt and expeditious remedy to injured workmen, the Court adopted, in effect, a rule that in the "twilight zone"—i.e., where there is substantial doubt whether the activity is sufficiently "local" to permit application of the state law—an award under either state or federal law would be deemed presumptively valid and be upheld.

The reasons why the "twilight zone" does not apply to tort liability are many, but a few may be briefly mentioned: the "local concern" test, the application of which is the very subject matter of the twilight zone, itself has no application to tort liability (as shown *supra*, pp. 27-29); in tort cases, the question of applicable law is raised as one of the choice of law to govern the single proceeding, so that there is no danger of inconsistent determinations; and the tort standard of the place of the injury, unlike the "local concern" standard governing workmen's compensation, is one capable of easy application.

Finally, while it is true that the practical result of *Davis* is to give an employee in the "twilight zone" an "election" to choose either the state or federal com-

22

compensation remedy, theoretically state and federal powers still remain mutually exclusive, and the election results only as an incidental by-product of the necessity for a "practical solution to a practical problem" (Stewart, J., dissenting in *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 274). Petitioner's attempt here to apply "twilight zone" concepts in tort actions, not to solve any practical problems that have arisen, but for the very purpose of giving him a free choice between two systems of substantive law, is thus a complete distortion of the underlying rationale of *Davis*.

3. Petitioner's reliance on *Hahn v. Ross Island Sand & Gravel Co.*, *supra*, as establishing that any person within the "twilight zone," as defined for workman's compensation purposes, may choose either state or federal law to govern a tort action for personal injuries (even, as here, against one not his employer) is untenable.

The Longshoremen's and Harbor Worker's Act makes its provisions for compensation, if applicable, exclusive, and bars the covered employee from bringing an action for damages against his employer. The question in *Hahn* was whether the federal act was applicable so as to bar such a damage action. By its terms, the federal act was not applicable if compensation could "validly be provided" by state law. Since *Hahn* was within the "twilight zone" in which either compensation act could be applied, there was thus raised one of those logical difficulties inherent in the concept of the "twilight zone": which act was to be presumed "applicable" when the employee had in fact proceeded under neither? The Court resolved

the impasse by accepting the presumption contended for by the employee, who as a practical matter normally has the power to "elect" which statute to come under. Since, under that presumption, the matter was within the constitutional power of the state to provide for compensation, the federal act was by its own terms inapplicable. Accordingly, Hahn's damage suit against his employer, which the state compensation act permitted because the employer had elected to reject compensation insurance, was not barred by the federal statute.

That, we believe, is all that was decided in *Hahn*. The only issue was whether the federal compensation act barred Hahn from bringing a damage suit at all, and the issue of what substantive tort law would govern the damage suit if maintainable was neither decided nor adverted to. Indeed, the only intimation in the opinion of the nature of the damage suit is the statement that the state compensation law permitted an employee of a noncomplying employer to "maintain in the courts a negligence action for damages" (p. 273). The statute cited provides that a suit may be brought for injuries caused by "negligence, default or wrongful act". Ore. Rev. Stat. 656.024. Thus, neither the opinion nor the cited statute carries any implication whether the negligence action would be confined by the substantive standards of the maritime law or be governed by some unmentioned state rule.

In fact, it appears from the decision of the Oregon Supreme Court in the *Hahn* case, as petitioner here alleges, that Hahn had sued for damages both under the reasonable care standard (the standard of mari-

time law) and under the stricter standard of care of the Oregon Employers' Liability Law here involved. The Oregon court, however, did not pass on whether the Liability Law could be applied to a maritime tort, because of its view that the action was in any event barred by the federal Longshoremen's Act. Hence that issue was not ripe for decision by this Court and the Court properly remanded the case to the state courts for further proceedings without passing on it.¹⁵

D. A STATE WRONGFUL DEATH STATUTE MAY NOT BE APPLIED TO CREATE A CAUSE OF ACTION FOR A DEATH OCCURRING ON NAVIGABLE WATERS UNLESS THERE WAS ALSO A BREACH OF DUTY UNDER THE STANDARDS OF THE MARITIME LAW

It is established, of course, that state law may be applied in admiralty to provide a remedy for wrongful death. *E.g., The Hamilton*, 207 U.S. 398; *West-*

¹⁵ Even if the case had held, as petitioner claims, that Hahn's suit for damages would be governed by state law rather than federal law, although for a maritime tort, it would not follow that state law could be applied in an action not specifically authorized as an alternative to compensation when the employer fails to insure under the compensation act. In the *Hahn* situation, allowance of the action under state law might be deemed a substitute for compensation or as a penalty against the employer for his failure to comply with the compensation act. See, *e.g.*, 37 Tex. L. Rev. 645, 647-648; 72 Harv. L. Rev. 1363, 1368; 33 Tul. L. Rev. 899, 902. That is, the state's power in those circumstances to enforce a tort action under strict state standards might be deemed to derive from its conceded power to provide for workmen's compensation, the tort action being an instrument for enforcing the compensation act. Such a holding would clearly not, however, support the application of state law to an action on a maritime tort brought against one other than the employer—particularly where, as here, the plaintiff had already received compensation.

ern Fuel Co. v. Garcia, 257 U.S. 233; cf. *Just v. Chambers*, 312 U.S. 383. In all of those cases, the substantive standards of tort liability applied were identical with those of the maritime law, and, since there was no maritime policy opposed to a wrongful death remedy, the state statutes were a permissible supplement to the maritime law.

Petitioner contends, however, that a state wrongful death statute may be applied in admiralty even though the basis for recovery is a standard of tort liability more strict than that of maritime law--i.e., even though there was no breach of duty under the maritime law in the sense that the decedent, had he lived, could have maintained an action on a maritime tort for his injuries. In particular, petitioner contends that even though the higher care standards of the Oregon Employers' Liability Law could not be applied in an action for injuries received on navigable waters, it can be applied if the injured person dies and the action is transformed into a wrongful death action.

Petitioner relies for that result on a statement in *The Tungus v. Skovgaard*, 358 U.S. 588, 592, that when "admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." The meaning of that statement, however, becomes clear from the issue before the Court: namely, whether, assuming the state wrongful death statute did not by its own terms apply to deaths caused by unseaworthiness, the statute could nevertheless be applied in admiralty

to give a wrongful death remedy for unseaworthiness. The Court held that it could not be; that the remedy, being state-created, was available only when the state said it was; or, in short, that the state "conditions and limitations" on the state remedy must be respected. Obviously, there was no issue of the application of state standards of substantive tort liability, for the very basis of liability being asserted was the maritime law of unseaworthiness.

Quite contrary to petitioner's contention, the opinions in *Tungus*,⁶ read as a whole, make plain that recovery under a wrongful death statute would equally be barred if there were no basis for the tort liability under the substantive standards of the maritime law. In short, two conditions must be satisfied for recovery in a wrongful death action: (1) there must be a breach of a duty defined by the maritime law; and (2) the state remedy invoked must be applicable by its own terms.

III

SINCE THE OREGON EMPLOYERS' LIABILITY LAW COULD NOT BE INVOKED IN AN ACTION AGAINST A PRIVATE INDIVIDUAL IN LIKE CIRCUMSTANCES IT CANNOT BE INVOKED AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

1. We have seen that, had this action been brought, under the law of Oregon, against a similarly-situated private defendant, the Oregon Employers' Liability Law could not have been invoked. The same result must be reached in this suit against the United States under the Federal Tort Claims Act for that Act pro-

vides that the Government's liability is to be governed by "the law of the place where the act or omission occurred * * * in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1346(b), 2674. This conclusion would seem to be obvious since all of the acts or omissions alleged, as well as the injury, occurred in Oregon.¹⁶

Petitioner contends, however, that the "place" where the alleged omission occurred was on land (i.e., the dam itself, which petitioner contends is an extension of "land") and hence that the proper reference under the Tort Claims Act is to the law governing torts occurring on land rather than torts occurring on navigable waters. Petitioner's premise is that the Tort Claims Act's reference to "the law of the place where the act or omission occurred" is a reference to a particular state substantive rule applicable to the specific locality or type of terrain on which the act occurred. The weakness of the argument is that, patently, the Act's choice-of-laws provision is no more than a typical conflicts rule specifying the *jurisdiction* or "legal authority"¹⁷ whose laws shall govern the action. It establishes what this Court has called a "territorial standard", choosing from among "the states or governments whose competing laws [might

¹⁶ For Federal Tort Claims Act cases applying general maritime principles under this theory, see *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (C.A. 4); *Russell, Poling & Co. v. United States*, 140 F. Supp. 890, 892 (S.D. N.Y.); *State Road Department v. United States*, 78 F. Supp. 278, 280 (N.D. Fla.); *Moran v. United States*, 102 F. Supp. 275, 278-279 (D. Conn.).

¹⁷ *Lauritzen v. Larsen*, 345 U.S. 571, 583; see also *Romero v. International Terminal Co.*, 358 U.S. 354, 384.

otherwise be] involved.” *Lauritzen v. Larsen*, 345 U. S. 571, 582, 584. Since only political entities have laws, “the law of the place” can mean nothing else. And once the reference has been made to the appropriate state, the determination of the substantive rule applicable to the particular transaction is a question of state law, limited, as here, by the state’s obligation to follow the maritime law.

Eastern Air Lines v. Union Trust Co., 221 F. 2d 62 (C.A.D.C.), certiorari denied *sub nom. Union Trust Co. v. United States*, 359 U.S. 911, relied upon by petitioner, held only that the action was governed by the law of the place where the negligent acts occurred (Virginia) rather than that of the place of the injury (District of Columbia). That was a choice simply of the jurisdiction to whose laws reference should be made and in no way conflicts with the instant case, where all the relevant events occurred in Oregon and it is agreed by all that Oregon law is controlling.

2. If the petitioner’s contention were correct, it would mean that Congress, in enacting the Tort Claims Act, did not simply waive the sovereign immunity from suit in tort by equating the Government’s liability to that of a “private individual under like circumstances,” but also substantively altered the accepted distinction between those torts which are governed by admiralty law and those which are not. Nowhere in the history of the Act, however, is there the slightest suggestion that Congress intended that the firmly established distinction between maritime torts subject to admiralty jurisprudence and land

torts governed by local law should be disregarded in suits against the United States. To the contrary, the committee reports clearly indicate that the sole purpose was "to waive a part of the governmental immunity to suit in tort." H. Rep. 1287, 79th Cong., 1st Sess., pp. 1-2.¹⁸

A similar attempt to read into a waiver of sovereign immunity a change in the general rules of admiralty jurisdiction was forcefully rejected in *Maine v. United States*, 45 F. Supp. 35 (D. Me.), affirmed, 134 F. 2d 574 (C.A. 1), certiorari denied, 319 U.S. 772. There it was contended that the Public Vessels Act had created jurisdiction in admiralty over an action for damages caused by a Government vessel's ramming of a bridge pier, although such an action between private parties would not have been within admiralty jurisdiction. In language equally applicable here, the district court said (45 F. Supp. at 37-38):

It is quite clear from the background and history of the legislation in Congress that there was no intention by the act in question to give rights of action against public vessels in cases not previously cognizable in admiralty against private vessels, the purpose of the act

¹⁸ See also S. Rep. 1400, 79th Cong., 2d Sess., pp. 29-30. As this Court stated in *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69: "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws."

being only to remove the defense of sovereign immunity.

It appears from extracts of reports of Committees of the Congress and from other statements made in the course of the passage of the legislation that it was intended by the act to give to private shipowners the same rights against the Government that they had against each other and to authorize actions against the United States of the type cognizable in admiralty between private parties. * * *

On the whole, it is * * * apparent that Congress in passing the act in question had no intention of enlarging admiralty jurisdiction to cover damage by vessels to land structures; nor of diminishing the rights of the Government except as to immunity to suit; * * *.

The Court of Appeals affirmed the "full, thorough and carefully reasoned opinion" of the district court that "the purpose of the Act [was] only to remove the defense of sovereign immunity". 134 F. 2d at 575, 576.

IV

THE OREGON EMPLOYERS' LIABILITY LAW IS BY ITS OWN TERMS INAPPLICABLE

Even if there were no constitutional prohibition against the application of the Oregon Employers' Liability Law in the circumstances of this case, petitioner's position would not be improved. By its terms, as construed by the Oregon Supreme Court, the coverage of the act in no event would extend to the situation at bar.

1. The repair and construction work called for by the contract was entirely under the supervision, control and direction of Larson, the decedent's employer. Larson was not only under a duty to supply all necessary equipment and labor but, additionally, he had the sole voice with respect to "the details, manner, [and] method by which the work under the contract was to be accomplished" (R. 58). For its part the Government possessed the right merely to insure that the "general result [was] in conformity with the contract's specifications" (R. 58).

As thus contemplated by the contract, the United States at no time assumed an active role in either the formulation or the execution of the sounding operation which led to the death of petitioner's decedent. At the outset, it was Larson who decided that soundings should be taken; the contract specifications neither required nor referred to such a course of action in the project area (R. 54). Having made this decision, Larson then determined for himself both how the operation was to be conducted and that it involved no undue risk to the personnel involved (R. 54-55, 58). Specifically, Larson (1) determined that the soundings would be taken in Bay 9 off the side of a barge; (2) concluded that only the gates in Bays 9 and 10 need be closed for this purpose; and (3) dispatched his superintendent on a reconnaissance mission to insure that the operation, as planned, could be safely conducted (R. 54-55). Larson did not seek the Government's opinion as to the safety of the operation; rather, the construction project engineer's participation was limited to receiving, and forwarding

to the operating personnel of the dam, the Larson request that the gates in Bays 9 and 10 be closed (R. 54-55). That request was honored (R. 54).

Larson himself selected the tug and barge to be utilized in the operation (R. 55, 58). He also selected the captain and other members of the tug's crew, as well as the personnel comprising the sounding party (which was in charge of a civil engineer in Larson's employ) (R. 55, 58-59). And Larson, or his representative, directed the method by which the tug and barge were to be fastened together and formulated the route that the unit was to take in reaching the situs of the proposed soundings (R. 55-56, 58).

2. The keystone of the Oregon Employers' Liability Law is Ore. Rev. Stat. 654.305, *infra*, pp. 49-50, which provides in relevant part:

Generally, all owners, contractors or subcontractors and other persons *having charge of, or responsible for, any work* involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb * * *. [Emphasis added.]

Ore. Rev. Stat. 654.310, *infra*, p. 50, dealing with the protective measures to be observed regarding dangerous machines, equipment and devices, begins with:

All owners, contractors, subcontractors or persons whatsoever, *engaged* in the construction, repairing, alteration, removal or painting of any building * * *. [Emphasis added.]

On its face, then, the statute imposes a special duty only upon those who, unlike the Government here, are

actually *engaged* in the work which subjects the employees to danger, or are in charge of it.

In *Warner v. Synnes*, 114 Ore. 451, the defendant lumber company had retained the plaintiff's employer, Synnes, as an independent contractor to do repair, alteration and construction work on the lumber company's premises. As is true of the Government here (R. 58), the lumber company did not exercise control over the work of the independent contractor but, rather, was interested only in the result. The company did, however, furnish certain equipment to Synnes, including a rope which was used by the latter on a scaffold. Injured when the rope broke, the plaintiff brought suit against the lumber company under the Employers' Liability Law, alleging that the company (1) had failed to provide a safe place to work; (2) had allowed an unsuitable rope to be used in the construction of the scaffold; and (3) had failed to test the material which it had furnished to the contractor.

In reversing a jury verdict in favor of the plaintiff, the Oregon Supreme Court stated (114 Ore. at 458):

It is well settled in this jurisdiction that where the work is in charge of a contractor and the party with whom he contracts is concerned only in the general result of the work and has no control of the details and manner in which the work shall be accomplished the contractor alone is responsible to the person in his employ who is injured during the progress of the work. * * * The reason for making the contractor alone responsible and exonerating the

owner with whom he contracts is that the owner is not the person in charge of the work and so is not responsible for the injury complained of * * *.

The court added that (114 Ore. at 458):

* * * The mere retention by the owner of the right to inspect work as it progressed for the purpose of determining whether it was completed according to plans and specifications does not operate to create the relation of master and servant between the owner and those engaged on such work * * *.

Cf. *Lawton v. Morgan, Fliedner & Boyce*, 66 Ore. 292; *Tamm v. Sauset*, 67 Ore. 292.

3. Notwithstanding *Warner v. Synnes, supra*, petitioner argues that it is totally irrelevant that the Government was not engaged in, in charge of, or responsible for the sounding expedition. His theory seemingly is that it is sufficient that employees of the United States operated the spillway dam and its gates.

A sufficient answer is that this line of argument totally ignores the fact that Larson's control over the manner in which the expedition was to be conducted extended to the matter of the number of dam gates that were to remain open while the soundings were taken (and, therefore, the amount of ~~water~~ which was being discharged). The determination that only the gates in Bays 9 and 10 would be closed was made by Larson on the basis of his superintendent's reconnaissance trip and his own knowledge (not shared by the Government) of the intimate details of the operation and the precise nature of the equipment which was to be utilized. And petitioner himself

places considerable emphasis on the evidence that, had Larson requested that an additional gate be closed, that request undoubtedly would have been honored.

Petitioner can point to no Oregon decision under the Liability Law in which an owner was held liable to an employee of an independent contractor in circumstances where the contractor possessed anything approaching Larson's degree of responsibility and control over every detail of the sounding operation and the conditions under which it was being carried out. Even a cursory examination of the cases upon which he relies will reflect their marked difference from the facts of this case.

In both *Rorvik v. Northern Pac. Lumber Co.*, 99 Ore. 58, and *Pacific States Lumber Co. v. Bargar*, 10 F. 2d 335 (C.A. 9), for example, the statute was held applicable because the plaintiff's employer and the defendant were actively engaged in a common pursuit and there was an intermingling of the two sets of employees. Cf. *Drefs v. Helman Transfer Co.*, 130 Ore. 452. And, in *Walters v. Dock Commission*, 126 Ore. 487, the accident occurred by reason of an affirmative act of the defendant in the course of its work (i.e., the ejection of the railroad car). This act was done without even the knowledge of any individual engaged in the work being performed by the decedent. Further, decedent's employer was not an independent contractor of the defendant and, unlike Larson, possessed no control whatsoever over the manner in which the railroad equipment was handled. Again, the only affirmative action taken by Govern-

ment employees in the present case which in any way affected petitioner's decedent was the closing of those gates which the persons engaged in, responsible for, and in charge of, the sounding operation deemed necessary for the safety of decedent and the other personnel involved.

Certainly, the recent Oregon Supreme Court decision in *Byers v. Hardy*, 68 Ore. Adv. Sh. 557, 337 P. 2d 806, from which the petitioner quotes at length (Pet. Br. 32-33), does not bolster his argument. Not only did the state Supreme Court expressly decline to decide what degree of control by the defendant would have been necessary before the Liability Law could have been invoked in that case but held, on the facts there present, that the defendant's control was insufficient to bring the Law into application.

4. While it was not necessary for the courts below to reach the question, it is worthy of note that the record does not support petitioner's contention that there was a violation by the Government of the standard of care prescribed by the Employers' Liability Law. Petitioner asserts (Pet. Br. 40) that the law imposed a duty upon the United States either (1) to close additional gates, or (2) to warn Larson as to the alleged "dangerous condition created by the turbulent waters in the immediate vicinity of [Bay 9]". But, as the district court found, the "turbulent condition of the water in the spillway basin was open, apparent and obvious to all, including the independent contractor, the operator of the tugboat and the other employees of the independent contractor" (R. 57). The court additionally found that the "difference in

elevation of the water in the turbulent area opposite the open gates, as compared with the area opposite the closed gates in the spillway basin was also visible and obvious" (R. 57).

In view of these findings, coupled with the trip made by the Larson superintendent for the sole purpose of determining whether the soundings could be taken safely, no duty to warn (on the part of the Government) could possibly have arisen under the Law. Larson's information as to the turbulent nature of the waters, and the significance thereof in terms of the safe conduct of the sounding operation, was superior to that of the Government.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ALAN S. ROSENTHAL,
SETH H. DUBIN,
Attorneys.

SEPTEMBER 1959.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b).

Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The 'Oregon Employers' Liability Law provides as follows (Ore. Rev. Stat.):

654.305 *Protection and safety of persons in hazardous employment generally.* Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible

for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

654.310 Protective measures to be observed regarding certain machines, equipment and devices which are dangerous to employes. All owners, contractors, subcontractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employes of the owner, contractor or subcontractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

654.315 *Persons in charge of work to see that ORS 654.305 to 654.335 is complied with.* The owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

654.320 *Who considered agent of owner.* The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

654.325 *Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or

subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and; if none, then his or her lineal heirs, and, if none, then the mother or father; as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

654.330 *Fellow servant's negligence as defense.* In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

- (1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

- (2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

- (3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

- (4) The incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

- (5) The act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.